U.S. Asylum Law Out of Sync with International Obligations: *REAL ID* Act*

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I dedicate this note to my family, especially Alison and my parents, for their steadfast support and encouragement. I extend my sincere gratitude to the staff and clients of Casa Cornelia Law Center. Special thanks to Professor Jorge A. Vargas, Tahra Broderson, Barbara White, and the SDILJ staff, for their comments and assistance.

I. INTRODUCTION

> The REAL ID Act will also weed out fraudulent asylum applications made by people lying through their teeth. By ferreting out asylum fraud, the supplemental appropriations bill strengthens our asylum system so those legitimately fleeing persecution are welcomed here[.][1]

Recent efforts to reform U.S. immigration law, especially House Bill 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act,[2] sparked mass peaceful protests in April 2006 with hundreds of thousands of individuals marching in cities across the United States to oppose stiffer criminal penalties for undocumented immigrants and demand legislation to legalize their immigration status.[3] Proponents of increased immigration restrictions claim that there are 12 million undocumented immigrants in the United States and that any effort to legalize their status will reward those who break U.S. laws and weaken

1. Press Release, Congressman F. James Sensenbrenner, Jr., House Passes Real ID (May 5, 2005), *at* http://www.house.gov/sensenbrenner/pr20050505.html (on file with SDILJ) [hereinafter "House Passes Real ID"] (Congressman Sensenbrenner is Chairman of the House Judiciary Committee).

2. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) (referred to Senate Committee on Jan. 27, 2006) [hereinafter "Border Protection bill"]. The Senate did not approve the Border Protection bill, but instead passed its own version of immigration reform in the Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) [hereinafter "Comprehensive Immigration Reform bill"].

3. Thousands of Latin American, Asian, and African immigrants, high school students, religious leaders, along with many other groups have marched in cities across the U.S. including, Los Angeles, Atlanta, Dallas, and Washington, D.C., to protest House Bill 4437, the Border Protection bill. Protests in Los Angeles and Dallas drew at least 500,000 people. Protestors condemn House Bill 4437 section 203 which makes unlawful presence in the U.S. a federal felony and section 202 which expands the definition of alien smuggling and has been interpreted as making it a crime to provide basic humanitarian assistance to an undocumented immigrant. *See, e.g.*, Gail Russell Chaddock, *Felony Threat Rouses Immigrants: Stiff Penalty in a House Bill Spurred Hundreds of Thousands to March in Cities Around the Nation*, CHRISTIAN SCI. MONITOR, Apr. 12, 2006, at 2; *Immigration Rallies Flood Cities Small and Large*, USA TODAY, Apr. 11, 2006, at 3A; Leslie Berestein, *50,000 Throng Downtown in Immigrant-Rights March: Protesters Seek to Sway Congress, Overhaul Policy*, SAN DIEGO UNION-TRIB., Apr. 10, 2006, at A1; Cynthia Leonor Garza, *Wave of Immigration Rallies Begins Today: Thousands Are Expected to March in Events Planned through Monday*, HOUS. CHRON., Apr. 9, 2006, at B1; *Protests Go On in Several Cities as Panel Acts*, N.Y. TIMES, Mar. 28, 2006, at A12.

national security.[4] Congress faces acrimonious debate over immigration reform as the House and Senate have passed competing legislation, which will be difficult to reconcile.[5] Approximately one year before these mass protests over immigration reform, Congress enacted under the guise of "national security," the REAL ID Act of 2005 ("REAL ID"), which restricts asylum eligibility and curtails judicial review of deportation orders.[6]

In the post 9/11 era, REAL ID represents an outgrowth of national security legislation prompted by the U.S. global war on terror.[7] The House Conference Report on REAL ID urged asylum reform in response to the 9/11 Commission's findings[8] that terrorist aliens[9] exploited U.S. asylum and immigration laws.[10] Fear of terrorist aliens is not the only

4. *See e.g.*, Michelle Malkin, The Illegal Alien "Gold Card", PITTSBURG TRIB. REV., Mar.15, 2006; P.J. Corr, *Illegal Immigrants Represent: 'Thrashing' of U.S. Citizenship*, TAMPA TRIB., Apr. 17, 2006, at 2.

5. On May 25, 2006, the Senate passed the Comprehensive Immigration Reform bill, which includes a provision that would offer a path to legalization to undocumented immigrants who have worked and resided in the U.S. for five years. Frank James, *Senate Oks Immigration Reform Bill: Passage Sets up Showdown with Tough House Plan*, CHI. TRIB., May 26, 2006, at 1. *See* Rick Klein, *House GOP Draws Line on Immigration*, BOSTON GLOBE, May 27, 2006, at A1 (discussing the significant divisions between House and Senate lawmakers regarding immigration reform).

6. Pub. L. No. 109-13, Div. B, 119 Stat. 231-302 (2005) [hereinafter "REAL ID"]. REAL ID was enacted May 11, 2005 as part of an emergency appropriations bill, but was originally introduced as H.R. 418.

7. *See, e.g.*, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, 120 Stat. 192 (2006) [hereinafter "Patriot Act Reauthorization"]. Patriot Act Reauthorization encountered considerable opposition in Congress concerning the effectiveness of the Patriot Act's homeland security provisions and whether incursions on civil liberties were justified. Sheryl Gay Stolberg, *Senate Passes Legislation to Renew Patriot Act*, N.Y. TIMES, Mar. 3, 2006, at A14. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955-57 (2002) (discussing the erosion of civil liberties, especially the freedoms of noncitizens, in the name of national security).

8. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, EXECUTIVE SUMMARY, 13-14 (2004) [hereinafter "9/11 COMMISSION REPORT"]; 9/11 COMMISSION REPORT 72, 80-82 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf; 9/11 AND TERRORIST TRAVEL, STAFF REPORT OF THE NATIONAL COMMISSION OF TERRORIST ATTACKS UPON THE UNITED STATES 138-39 (2004), *available at* http://www.9-11commission.gov/staff_statements /911_TerrTrav_Ch5.pdf.

9. While recognizing that the term "alien" is offensive, it is the term used in asylum and immigration law literature and will be used throughout this Comment. *See* Immigration and Nationality Act ("INA") § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2005) ("'[A]lien' means any person not a citizen or national of the United States.").

10. H.R. CONF. REP. NO. 109-72, 160 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 286 (indicating that Ramzi Yousef, mastermind of the 1993 World Trade Center bombing, among others, has abused lax U.S. asylum laws).

factor stimulating greater restrictions on asylum eligibility. Current asylum reform efforts are partly driven by a preoccupation with activist judges, especially as evidenced by the attempt to divide the Ninth Circuit Court of Appeals ("Ninth Circuit")[11] and consolidate the filing of immigration appeals in the Federal Circuit Court of Appeals.[12]

REAL ID was a response to calls for stricter enforcement of laws relating to refugees and immigrants. Those calls stressed greater policing of entry into the United States and ensuring that aliens who violate the law are deported.[13] Media accounts of the legislation focused on fast-tracking construction of a reinforced section of border fence in the San Diego region and establishing a new requirement that states issue federally approved driver's licenses.[14] However, three provisions of REAL ID have profound implications for asylum law: (1) the heightened credibility standards, (2) stripped judicial review of detention, and (3) expanded bars to asylum for any involvement in terrorist-related activities.[15]

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11. House Judiciary Chairman Sensenbrenner stated that one of his aims was to return asylum law to the way it was prior to activist judges' interpretation of it. According to Sensenbrenner, "[l]iberal activist judges in the 9th Circuit have been overturning clearly established precedent and are preventing immigration judges from denying bogus asylum applications by aliens who are clearly lying[.]" Howard Mintz, *U.S. Tightens Asylum Rules: More Evidence Needed from Immigrants*, S.J. MERCURY-NEWS, Sept. 19, 2005, at A13. *See* Bob Egelko, *New Limit on Review of Asylum Cases Immigration Judges' Decisions Would Be Harder to Overturn*, S.F. CHRON., May 16, 2005, at A1. Sensenbrenner also introduced a bill to divide the Ninth Circuit Court of Appeals, which the Justice Department supported. *See* Erica Werner, *Court Breakup Receives Support*, S.J. MERCURY-NEWS, Nov. 16, 2005, at B5.

12. The Senate is examining legislation to consolidate immigration appeals in the Federal Circuit. Securing America's Borders Act, S. 2454 § 501, 109th Cong. (2006) (bill calendared in May 2006) [hereinafter "Securing America's Borders Act"]. Letter from Mary M. Schroeder, Chief Judge, United States Court of Appeals for the Ninth Circuit, to Senators Specter and Leahy 2 (Mar. 31, 2006) (on file with SDILJ) (discussing the increase in appeals of Board of Immigration Appeals' decisions from 900 in 2001 to 6500 in 2005 and opposing the provision in the Comprehensive Immigration Reform Act of 2006 that would consolidate immigration appeals in the Federal Circuit). Emma Schwartz, *A Simmering Border Dispute: A Plan to Have the Federal Circuit Hear Immigration Appeals Worries Judges and Advocates Alike*, LEGAL TIMES, Apr. 3, 2006, at 1 (noting that the Federal Circuit is ill equipped to handle the nation's immigration appeals as consolidation "would foist a growing docket of more than 12,000 cases a year on to a court whose 12 judges usually handle no more than 125 cases annually").

13. *See, e.g.*, Kathy Kiely, *Republicans Debate How Tight Border Should Be*, USA TODAY, Apr. 29, 2005, at 17A.

14. *See, e.g.*, Elisa Crouch, *"Real ID" Has States Scrambling*, ST. LOUIS POST-DISPATCH, May 12, 2005, at A1; Donna Leinwand, *Real ID Act Edges Closer to Passage*, USA TODAY, May 6, 2005, at 3A; Mary Curtius, *Tough Stand Likely on IDs*, L.A. TIMES, May 3, 2005, at 1.

15. *See REAL ID Now the Law*, 82 No. 20 INTERPRETER RELEASES 813 (May 16, 2005) [hereinafter "REAL ID Now the Law"]; Michael Garcia, Margaret Mikyung Lee & Todd Tatelman, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, CRS REPORT RL32754 (updated May 25, 2005), *available at* http://fpc.

U.S. asylum policy is an extremely volatile issue. Its very terms are highly charged, as evidenced by the strong opposition to labeling U.S. citizens "refugees" because the term connotes foreignness. Following Hurricane Katrina, there was considerable backlash from calling evacuees of New Orleans and the Gulf Coast "refugees".[16] Current efforts at immigration reform,[17] especially as evidenced by vitriolic rhetoric in public debates[18] and mass demonstrations opposing proposed stiffer criminal penalties for undocumented immigrants,[19] illustrate the divisiveness of immigration and asylum policies. In asylum and refugee literature and this Comment, the term "refugee" refers to an individual outside her country of nationality who fears returning to that country, whereas, "asylum seeker" refers to an alien physically present in the United States who fears returning to the country from which she fled.

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state.gov/documents/organization/47141.pdf [hereinafter "IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID"].

16. In the aftermath of Hurricane Katrina, newspaper editors around the U.S. received a flurry of letters expressing indignation over the use of the term "refugee." In early September 2005, President Bush bowed to some of the criticism and stated that evacuees from Hurricane Katrina are "not refugees[;] [t]hey are Americans[.]" Harry Levins, *Are Victims Refugees? Editors, Dictionaries, Readers Weigh in*, ST. LOUIS POST-DISPATCH, Sep. 7, 2005, at A13. Reverend Jesse Jackson, reflecting a growing public sentiment, expressed his outrage that evacuees from New Orleans were labeled "refugees." Laura Maggi, *"Refugee" a Demeaning Term, Jackson Says*, NEW ORLEANS TIMES PICAYUNE, Sept. 4, 2005, *available at* 2005 WLNR 14616419.

17. The Border Protection bill creates a statutory bar to asylum for any alien participating in a "criminal street gang" which violates human rights standards regarding arbitrary detention. H.R. REP. NO. 109-345 (Part I) (2005) (Section 608 of the Border Protection bill renders alien gang members deportable and inadmissible, mandates their detention, and bars them from receiving asylum or Temporary Protected Status).

18. *Compare* Anne C. Mulkern, *Tancredo Labels Bill as Threat to Security*, DENV. POST, Feb. 26, 2006, at A18 (According to Congressman Tancredo, "[b]y legalizing the millions upon millions of illegal aliens in the U.S., [Senator] Specter makes a mockery of our laws and crushes our already strained legal immigration system") *with* Teresa Watanabe, *Immigrants Gain the Pulpit*, L.A. TIMES, Mar. 1, 2006, at 1 ("'The war on terror isn't going to be won through immigration restrictions,' [Cardinal Roger Mahony] said . . . [and] he would instruct his priests to defy legislation—if approved by Congress —that would require churches and other social organizations to ask immigrants for legal documentation before providing assistance and penalize them if they refuse to do so.").

19. *See supra* note 3 and accompanying text. *But see* Dahleen Glanton, *Illegal Immigrants Brace for State Laws: Legislatures Push Own Measures as Congress Struggles to Reach Consensus*, CHI. TRIB., Apr. 10, 2006, at 1 (discussing efforts by state legislators in Georgia, Virginia, and Tennessee to restrict illegal immigration and improve enforcement of immigration laws even though immigration is an area traditionally left to Congress).

Under domestic and international law, the United States has obligations not to peremptorily return individuals fearing for their life or freedom.[20] Article 33 of the 1951 U.N. Convention on the Status of Refugees ("Refugee Convention") sets forth this duty, known as non-refoulement or protection from return.[21] Article 1 of the Refugee Convention defines a "refugee" as a person outside her country of nationality who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" such that she is unable or unwilling to return to that country.[22] Although the United States did not initially sign the Refugee Convention,[23] it became a party to the Convention in 1968 by acceding to the 1967 UN Protocol Relating to the Status of Refugees ("Refugee Protocol").[24] The duty of non-refoulement, beyond treaty obligations contained in Article 33 of the Refugee Convention, has achieved the status of customary international law, thus, binding states that are non-parties to the Refugee Convention.[25] U.S. legislation, through the "withholding of removal"[26] provision in the Immigration and Nationality Act, also recognizes the

20. Article 33 of Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 152 (achieved sufficient signatories Apr. 22, 1954) [hereinafter "Refugee Convention"]. Article 33 of the Refugee Convention sets forth that the host country has discretion to exclude refugees who are threats to security or have been convicted of a particularly serious crime. Article 1 provides that states may exclude individuals who have committed crimes against peace, humanity, or war crimes, as well as those who committed a serious non-political crime outside the country of refuge. *Id.* at 6263. *See also* Article 3 of Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 14 U.N.T.S. 85, 23 I.L.M. 1027, 1028 (entered into force June 26, 1987) [hereinafter "Convention Against Torture"].

21. Refugee Convention, *supra* note 20, at 19 U.S.T. 6276 ("No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

22. *Id.* at 6261.

23. *See* Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 145 n.28 (1994).

24. Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, T.I.A.S. 6577 (entered into force Oct. 4, 1967) [hereinafter "Refugee Protocol"].

25. GUY S. GOODWIN GILL, THE REFUGEE IN INTERNATIONAL LAW 167 (2d ed. 1996); Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 252 (1996); Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, 89, 140-46 *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller et al. eds., 2003), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/publ?id=41a1b51c6 (Lauterpacht and Bethlehem rely upon the International Court of Justice's analysis in North Sea Shelf case to assert that non-refoulement has achieved status of customary international law).

26. Previously known as Withholding of Deportation. *See* 8 C.F.R. § 208.16(b)(1) (1988).

duty of non-refoulement.[27] In addition, as a signatory to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") the United States has a duty not to return an individual to a country where there are substantial grounds for believing that she would be subjected to torture.[28] Nevertheless, numerous commentators have observed that the United States has enacted procedures violating its duty of non-refoulement.[29] One critic highlights the discrepancy between United States and international law in the adjudication of asylum claims and argues that "[t]he gap between available domestic protection and the imperatives of international obligation results in a serious denial of justice to many asylum-seekers."[30]

Contracting states reaffirmed their commitment to the Convention and Protocol in 2001, which marked the 50th anniversary of the Refugee Convention.[31] However, 2001 did not signal an expansion of refugee

27. In addition to asylum, which is governed by INA section 208 (2005) [(8 U.S.C. § 1158 (2005)], the INA contains several related relief provisions, including "withholding of removal" under INA § 241(b)(3)(B) (2005) [8 U.S.C. § 1231(b)(3)(A) (2005)], as well as withholding and deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. §§ 208.16-208.17 (2005). Although the United States became a party to the Refugee Protocol in 1968, it was not until the enactment of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102) that U.S. law conformed with international treaty obligations under the Refugee Protocol. *See* Kathleen M. Keller, Note, *A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 194 (1999).

28. *See* Article 3 of the Convention Against Torture, *supra* note 20. The U.S. implemented the Convention Against Torture's prohibition against return of an individual who is more likely than not to be tortured in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277 at § 2242, 112 Stat. 2681-822 (1998). Regulations adopted pursuant to this legislation are codified at 8 C.F.R. §§ 208.16-18, 1208.16-18, and 22 C.F.R. § 95.2 (2005).

29. Koh, *supra* note 23, at 145-46; Keller, *supra* note 27, at 184; Samuel L. David, Note, *A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769, 804 (2003).

30. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 3 (1997).

31. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, Dec. 12-13, 2001, U.N. Doc. HCR/MMSP/2001/09 (2002), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=419c74d64 [hereinafter "2001 Declaration"]. The 2001 Declaration was welcomed by the U.N. General Assembly in resolution A/RES/57/187, para. 4, adopted on Dec. 18, 2001. Paragraph 4 is "at its core the principle of non-refoulement, whose applicability is embedded in customary international law[.]" *Id.*

protection. On the contrary, even though 146 states are parties to the Refugee Convention or Protocol,[32] Western countries have increasingly restricted the entry of refugees within their territories and are more inclined to detain refugees who reach their borders without a valid entry document.[33]

National security has become an ubiquitous term in recent years.[34] The term is invoked to justify restricting asylum law, associated with the scapegoating of refugees and immigrants,[35] and is often cast in opposition to civil liberties.[36] National security has become a term of art, which is frequently referenced to justify efforts to police entry into the United States by tightening immigration and asylum laws even though the effectiveness of these measures is unsubstantiated.[37] Popular usage of the term offers a skewed perspective that national security has only recently become a dominant concern. On the contrary, national security as applied to control of territorial borders has a long heritage and is

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32. States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, United Nations High Commissioner for Refugees (UNHCR), *at* http://www.unhcr.org/cgi-in/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63.

33. *See generally* Liza Schuster, *A Sledgehammer to Crack a Nut: Deportation, Detention and Dispersal in Europe*, 37 PATTERNS OF PREJUDICE 233 (2003); Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 323-33 (2005); THE REFUGEE COUNCIL USA, U.S. REFUGEE ADMISSIONS PROGRAM FOR FISCAL YEAR 2004 1 (May 2003) ("The U.S. refugee program is at the most critical stage in its history, with only 27,508 refugees, the lowest in 25 years, having been resettled in the United States in Fiscal Year (FY) 2002.").

34. National security and immigration were central topics during the 45th Mexico-U.S. Interparliamentary group meeting in March 2006. U.S. and Mexican legislators recognized a shared responsibility on migration and border security, but Mexican legislators continue to protest the proposed construction of another wall along the U.S.-Mexico border. *See* Jason Lange, *U.S., Mexico Discuss Migration, Security*, Mar. 6, 2006, *available at* http://www.banderasnews.com/0603/nr-valledebravo.htm. *See also Concluyen trabajos de la Interparlamentaria México-Estados Unidos*, BOLETIN 2714 Bis (Mar. 3, 2006), *available at* http://comunicacion.diputados.gob.mx/boletines/2006/boltn_030306.htm. Furthermore, the topic of immigration was also central at the recent trilateral summit between U.S., Mexico, and Canada, even though there was no consensus as to how to approach the issue. *See* William Douglas, *Summit Ends with No Gains: Immigration Divides Bush, Fox, Harper*, PITTSBURG POST-GAZETTE, Apr. 1, 2006, at A1.

35. *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 1-14 (2004) (discussing the ways that national security concerns resulted in the scapegoating of aliens focusing on the 1920s-1940s); Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 369 (2005) ("The cumulative impact of various measures designed to deter asylum seekers is to drive them deeper into the hands of smugglers and the world of clandestine, illegal and dangerous modes of travel . . . [leading to the view of them as] 'illegals.'").

36. *See* Ronald Dworkin, *Terror & the Attack on Civil Liberties*, THE NEW YORK REVIEW OF BOOKS, Nov. 6, 2003, at 37.

37. *See* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 103 (2006).

rooted in the concept of sovereignty. The discourse and increased prominence of national security in legislation since 9/11, however, has contributed to a political climate where legislation restricting immigrants' and asylum seekers' rights generates relatively little protest and scant public notice.[38]

Focusing on defensive[39] asylum applications, this Comment examines whether certain provisions of REAL ID violate due process and international obligations to asylum seekers. Part I situates REAL ID within the historical context of nearly a decade of restrictive U.S. immigration law and over two decades of Executive Orders aimed at deterring a mass exodus of asylum seekers from reaching U.S. shores. Part II provides an overview of the U.S. asylum system and argues that the system produces inconsistent and sometimes arbitrary results, indicating that segments of the system do not satisfy international obligations. Part III outlines three provisions of REAL ID: 1) heightened burden of proof, credibility, and corroborating evidence standards; 2) stripped judicial review of detention; and 3) terrorist-related bars to asylum; and examines their implications with respect to asylum case law. Part IV explains how those three provisions of REAL ID violate due process and international law. Part V recommends restoring administrative appellate review of immigration judges' decisions, restoring judicial review of discretionary determinations in the asylum process, making individual determinations of whether an asylum seeker should be detained during proceedings, providing asylum seekers with an attorney, raising the quality of legal representation in Immigration Courts, and providing adjudicators and asylum officers with greater guidance on credibility and evidence standards.

38. Demonstrations across the U.S. in March and April 2006 protesting proposed immigration restrictions and demanding an amnesty for undocumented immigrants suggest that certain sectors are no longer willing to remain silent on the increased restriction of immigrants' rights. *See, e.g.*, Nicholas Confessore, *Thousands Rally in New York in Support of Immigrants' Rights*, N.Y. TIMES, Apr. 2, 2006, at 129.

39. There are two paths to asylum: filing an affirmative application with the United States Citizenship and Immigration Services ("USCIS") or a defensive application where the asylum seeker has been placed in removal proceedings and the application is filed to request relief from deportation. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 5 (3d ed. 1999).

II. IMMIGRATION AND ASYLUM LAW: RESTRICTIVE CLIMATE

The central body of U.S. immigration and asylum law, the Immigration and Nationality Act ("INA")[40] has undergone substantial changes in the last twenty-five years. In 2003, the Immigration and Naturalization Service ("INS"), the executive agency charged with administering and enforcing immigration and asylum laws was dismantled and its functions were transferred to various components within the Department of Homeland Security ("DHS").[41]

Fear of illegal immigration and calls to build more fencing along the U.S.-Mexico border,[42] Coast Guard vessels interdicting Cuban and Haitian refugees on makeshift rafts at sea,[43] and greater concern with preventing foreign terrorists from entering the country, characterize this twenty-five year period.[44] Immigration officials expressed growing concerns that asylum seekers were presenting false claims to secure employment authorization.[45] Seizing and fueling public sentiment with curbing immigration, Speaker Gingrich's Congressional Task Force proposed several reforms,[46] including those which became the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA")[47]

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40. Immigration and Nationality Act ("INA") was created in 1952 by the McCarran-Walter Act to centralize and codify immigration statutes. Pub. L. No. 82-414, 66 Stat. 163 (1952).

41. *See* Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002). For clarity, this Comment will refer whenever possible to the various DHS components, rather than the INS, which have been responsible since 2003 for administering and enforcing asylum law.

42. *See generally* JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE 'ILLEGAL ALIEN' AND THE MAKING OF THE US-MEXICO BOUNDARY 165-66 (2001); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 37-61 (2001).

43. *See generally* MARIO ANTONIO RIVERA, DECISION AND STRUCTURE: U.S. REFUGEE POLICY IN THE MARIEL CRISIS 41-54 (1991); Abby Goodnough, *Tensions Rise as More Flee Cuba for U.S.*, N.Y. TIMES, Dec. 18, 2005.

44. *See* Cole, *supra* note 7, at 957. *See also* Jennifer Lin, *Is America Closing Its Doors? More and More Americans Fear That Immigration Threatens the National Culture and Their Personal Economic Well-Being*, BOULDER DAILY CAMERA, Jul. 2, 1995, at 1E ("'The word is out all over the world that you can just come here illegally and you don't have to worry,' [Congressman] Bilbray said. 'That's the kind of message we've got to stop. We need to bring credibility back to immigration law.'").

45. *See Senate Judiciary Committee Holds Meissner Confirmation Hearing*, 70 No. 38 INTERPRETER RELEASES 1289 (Oct. 4, 1993).

46. *See* Zoe Lofgren, *A Decade of Radical Change in Immigration Law: an Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 355 (2005).

47. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.). President Clinton, when signing the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA") into law, declared that this "landmark" legislation "strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system-without

and the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[48]

A. Restrictive Legislation Since 1996: IIRIRA, AEDPA, and Patriot Act

An aim of IIRIRA was to increase the distinction between illegal and legal immigration. The legislation was supposed to reduce illegal immigration by improving immigration officers' ability to deport an alien who lacked valid entry documents or made a material misrepresentation through a procedure known as expedited removal.[49] Expedited removal grants immigration officers the power to exclude without a hearing an alien at a port-of-entry into the United States who lacks valid entry documents and certain criminal aliens.[50] IIRIRA and AEDPA sought to expand expedited removal by restricting judicial review of immigration decisions thereby speeding the process of deporting an unlawful alien.[51] In addition, IIRIRA enlarged the grounds of inadmissibility[52] and deportability, as well as broadened the category of crimes constituting an aggravated felony, which bars relief from deportation.[53]

While proponents of the expanded application of expedited removal claimed that administrative efficiency and national security justified its expansion, critics noted that expedited removal has been devastating for

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punishing those living in the United States legally." Statement by President William J. Clinton upon Signing H.R. 3610, Sept. 30, 1996, *reprinted in* 1996 U.S.C.C.A.N. 3388, 3391.

48. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (restricting judicial review of deportation decisions and narrowing the class of aliens eligible for a discretionary waiver of deportation). *See generally* Rachel K. Hinkle, *INS v. St. Cyr*, 28 OHIO N.U. L. REV. 815 (2002) (discussing AEDPA in the context of immigration law).

49. 1-2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.04 (2005). For a detailed account of the debates surrounding 1996 asylum reform legislation, see PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM (2000).

50. CHARLES GORDON ET AL., *supra* note 49.

51. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412 (1997); James M. Czapla, *Removal of Judicial Review Under the Illegal Immigration Reform and Immigrant Responsibility Act: The Different Interpretations of 8 U.S.C. § 1252(B)(3)(B)*, 38 SUFFOLK U. L. REV. 603, 609-10 (2005).

52. The term inadmissibility refers to precluding certain aliens from entering the U.S. Grounds of inadmissibility include public health threat, convicted of a crime involving moral turpitude, prostitution, national security—terrorists, and likely to become a public charge. *See* 8 U.S.C. § 1182 (2005).

53. CHARLES GORDON ET AL., *supra* note 49.

asylum seekers who often are not familiar with the asylum process.[54] IIRIRA and AEDPA compounded the difficulties asylum seekers, who usually lack legal representation, faced in navigating through the maze of asylum law by adding jurisdictional barriers from the moment of the initial request for asylum at the port-of-entry.[55] Asylum seekers at the port-of-entry were particularly vulnerable having often survived traumatic experiences, often lacking English language skills to communicate, and were unlikely to carry documentary proof of their asylum claim.[56] Further, although the prolonged detention of asylum seekers was not a stated goal of AEDPA or IIRIRA, it was one of the consequences of these measures.[57]

Humanitarian assistance[58] to asylum seekers and refugees was receding, but in 2001 Congress significantly altered the guiding principles concerning immigrants and asylum seekers. After the September 11, 2001 attacks on the World Trade Center, Congress enacted the Patriot Act, expanding law enforcement powers in an effort to prevent future terrorist attacks. The Patriot Act marks a shift in U.S. asylum law.[59] One of its most controversial provisions, recently revisited by Congress,[60] is the indefinite detention of non-citizens suspected of posing a threat to national security.[61] Although the Patriot Act did not substantially modify asylum

54. *See* Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*, *in* 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 178, 191-99 (U.S. Comm'n on Int'l Religious Freedom, Feb. 2005), *available at* http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/conditionConfin.pdf (last visited Aug. 20, 2006). Expedited removal is governed by regulations 8 C.F.R. §§ 235.3(b)(2)(iii) and 235.3(b)(4) (2005).

55. *See* Keller, *supra* note 27, at 203-04; James F. Smith, *United States Immigration Law as We Know It: El Clandestino, the American Gulag, Rounding up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 781 (2005) (discussing expedited removal with regard to criminal aliens).

56. *See* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, Executive Summary, 1, 3-4 (Feb. 2005), *available at* http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/execsum.pdf (last visited Jan. 10, 2006) [hereinafter "REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL"].

57. Lofgren, *supra* note 46, at 356, 364-65.

58. The Department of Health and Human Services provides humanitarian assistance, including cash, medical assistance, skills training, and job placement, for refugees living in the United States. U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, *General Information*, at http://www.acf.hhs.gov/programs/orr/geninfo/index.htm (last visited Aug. 27, 2006).

59. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (signed into law on October 26, 2001) [hereinafter "Patriot Act"].

60. Patriot Act Reauthorization, *supra* note 7.

61. *See* Regina Germain, *Rushing to Judgment: the Unintended Consequences of the USA Patriot Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 507-08 (2002) (discussing the implications of the Patriot Act for asylum seekers). Regarding the Patriot Act, "[u]nlike in 1995 and 1996, when the INS by regulation and later Congress by

or withholding of removal in the INA's text, the Patriot Act disqualifies asylum seekers who are deemed to have engaged in terrorist activity.[62] Also included in the Patriot Act was a provision authorizing immigration hearings to be closed to the public.[63] One commentator notes that closed hearings is part of a policy of "[s]ecrecy across the board, without any obligation to present case-specific reasons for it in court, has less to do with the war on terrorism than with the administration's consistent efforts, firmly in place before 9-11, to insulate executive action from public scrutiny."[64] The implications are very alarming for asylum seekers who are often anxious and bewildered by the asylum process when they first come into contact with an immigration officer, have significant communication barriers, and lack access to an attorney.[65]

The Bush Administration has pursued such a broad interpretation of who has provided material support to a terrorist organization that victims who were forced to provide assistance are ineligible for asylum.[66] In April 2001, the U.S. Committee for Refugees criticized the INS Asylum

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statute sought to overhaul the asylum process because of both real and perceived abuses, neither Congress nor the Administration highlighted (or even mentioned) the need to reform the asylum process." *Id.* at 517.

62. The Patriot Act amended the INA § 208(b)(2)(iv) and (v), thus barring from asylum individuals who are a threat to national security or who have engaged in, are likely to engage in, or have incited terrorist activity, are representatives of foreign terrorist organizations, or who use their positions of prominence to endorse terrorist activity. *See id.* at 518.

63. Former Chief Immigration Judge Creppy issued regulations and there has been some backtracking on this issue of closed immigration hearings. It appears that sensitive material is granted a protective order, it cannot be disclosed, and that portion of the hearing is closed. *See id.* at 525 n.139. Federal appellate courts are split regarding whether closure of immigration hearings to the public withstands constitutional attack. *Compare* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 201 (3d Cir. 2002) (holding that newspapers do not have a constitutional right of access to deportation hearings), *with* Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002) (holding directive closing deportation hearings impermissibly infringed on newspapers' constitutional right of access).

64. Stephen J. Schulhofer, *At War With Liberty: Post 9-11 Due Process and Security Have Taken a Beating*, AM. PROSPECT 5, 9 (Mar. 1, 2003).

65. *See* Germain, *supra* note 61, at 515-16.

66. Michele L. Lomardo et al., *Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post-9/11, Post-Patriot Act, Post-REAL ID Act World*, 4 REGENT J. INT'L L. 237, 238 (2006). *See* Rachel L. Swarns, *Provision of Antiterror Law Delays Entry of Refugees*, N.Y. TIMES, Mar. 8, 2006, at A20 (Resettlement of Burmese refugees from Thailand to the U.S. was in question because refugees paid taxes or provided food to rebel groups resisting the repressive and authoritarian Burmese government; such activities are considered providing material support to a terrorist organization.).

Office for labeling "extortion," the payment of ransom to Colombian guerrillas, as "material support to a terrorist organization".[67] Scholars have warned that in the absence of legislative history "[t]he INS, Immigration Judges, and federal courts appear to be left with little more than the text of the USA PATRIOT Act and the rule of statutory construction to guide their interpretation[.]"[68] Statutory interpretation often involves politics and discerning legislative meaning is highly contested.[69] Unfortunately, those most vulnerable in the rivalry over statutory interpretation are asylum seekers whose interests are often not represented in the process.

Furthermore, immigration officers and border patrol agents who first encounter asylum seekers at the border or at airports sometimes improperly return asylum seekers who have a legitimate asylum claim. Arbitrary actions by border patrol agents who flagrantly violate aliens' human rights, especially those of undocumented workers, and which go unpunished are well documented.[70] While international standards imply that there is a right to asylum,[71] the United States does not have a policy of informing individuals of a right to seek refuge in this country.[72] The United States does, however, have a policy of inquiring as to whether an alien has a fear of returning to her country of nationality.[73] A 2005 study by the U.S. Commission on International Religious Freedom found that immigration officers not specifically trained to deal with asylum seekers sometimes improperly preclude individuals from presenting asylum claims.[74]

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67. Germain, *supra* note 61, at 512-13.

68. *Id.* at 517-18.

69. Cheryl Boudreau et al., *The Judge as a Fly on the Wall: Interpretive Lessons from Positive Political Theory, in* WHAT DO STATUTES MEAN? 1, 22, 59 (Matthew D. McCubbins & Daniel B. Rodriguez eds., forthcoming); Cheryl Boudreau et al., 38 LOY. L. REV. 2131, 2145 (2005).

70. Vargas, *supra* note 42, at 37-65.

71. *See* Universal Declaration of Human Rights, Article 14(1) regarding the right to seek and enjoy asylum. G.A. Res 217A (III), U.N. Doc. A/810 at 71 (1948). *See also* American Convention on Human Rights, article 22(7), but note that the United States is not a party to this convention. Nov. 21, 1969, 1144 U.N.T.S. 143; 9 I.L.M. 99, 107-08 (1969).

72. *See* Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 319 (2001); Rachel L. Swarns, *Rights Groups Criticize Speedy Deportations*, N.Y. TIMES, Feb. 20, 2006, at A9.

73. *See* CHARLES GORDON ET AL., *supra* note 49.

74. REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, *supra* note 56 at 1, 3-4.

B. Executive Orders

In the past twenty-five years, detention has been used as a means of deterring a mass exodus of asylum seekers from Caribbean countries, especially Cuba and Haiti, from reaching Florida's shores.[75] Detention and restraints imposed in the 1990s on Cubans and Haitians amounted to preclusion of the right to seek asylum.[76] U.S. immigration officials violated international treaty obligations by only allowing individuals held at offshore camps "safe haven," and not allowing asylum seekers to present their claims of persecution.[77]

In the wake of a mass exodus of refugees from the Caribbean, several U.S. presidents have issued executive orders to deter those fleeing Caribbean countries from reaching U.S. shores. There was a mass exodus of Cubans to the United States in the early 1980s during the Mariel crisis,[78] and in July 1994. Former Presidents Carter, Reagan, and Clinton issued executive orders authorizing the Coast Guard to prevent Cubans from reaching U.S. shores and empowering local law enforcement to detain Cubans refugees arriving on the Florida coast. The Coast Guard intercepted undocumented refugees from Cuba at sea and took them to Guantanamo.[79] Similarly, former President George H. Bush issued Executive Order No. 12807 to deter a mass exodus of Haitians by mandating the direct return of Haitians intercepted at sea.[80] Around 41,000

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75. Koh, *supra* note 23, at 172. A recent example of the interplay of national security interests with the deterrence of asylum seekers is Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003). Former Attorney General Ashcroft in *Matter of D-J-* reversed the Board of Immigration Appeals' decision to release a detained Haitian asylum seeker on bond.

> [R]elease of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. As substantiated by the government declarations, surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities.

D-J-, 23 I&N Dec. at 579.

76. Koh, *supra* note 23, at 164-72.

77. *Id.* at 168.

78. The 1980 Mariel Crisis involved a mass exodus of Cubans from Mariel harbor to U.S. shores when Cuban President Fidel Castro lifted the ban prohibiting Cubans from leaving the island. 1-8 Charles Gordon et al., *supra* note 49, § 8.09.

79. Koh, *supra* note 23, at 155.

80. 57 Fed. Reg. 23133 (June 1, 1992).

Haitians were interdicted at sea between 1992 and 1994.[81] The United States abandoned its policy of direct return of Haitian refugees around May 1994 as a result of the Congressional Black Caucus' intervention and mounting domestic pressure.[82]

The offshore camps housing Haitians created buffer zones that deprived Haitians of procedural rights that they would have received upon reaching U.S. soil.[83] At these offshore camps, INS asylum officers screened refugees.[84] Credible fear interviews took place aboard Coast Guard vessels.[85]

Contesting the screening procedures and challenging U.S. violation of its duty of non-refoulement in federal courts failed.[86] The Supreme Court held in *Sale v. Haitian Centers Council*[87] that the screening procedures complied with the duty of non-refoulement and did not violate the Constitution. Critics argued that the Court's holding encouraged the executive branch to continue its policy of offshore refugee camps and undermined international respect for refugees' rights.[88] The Court narrowly interpreted the Refugee Convention's duty of non-refoulement as not triggered unless an asylum seeker reached U.S. shores.[89] The Inter-American Commission on Human Rights in an advisory opinion, however, did not find that the U.S.' duty of non-refoulement was geographically restricted to refugees who reached U.S. territory.[90] A strong argument can be made that because the duty of non-refoulement has achieved the status

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81. Walt Bogdanich & Jenny Nordberg, *Mixed U.S. Signals Helped Tilt Haiti Toward Chaos*, N.Y. TIMES, Jan. 29, 2006, at 11.

82. Koh, *supra* note 23, at 153-54.

83. *Id.* at 139-42.

84. *Id.* at 143.

85. *Id.* Credible fear interviews conducted by asylum officers are meant to be non-adversarial to determine whether the asylum seeker establishes eligibility for asylum, namely by showing past persecution or a well-founded fear of future persecution. *See* 8 C.F.R. § 208.30 (2005) for a current description of credible fear determinations of stowaways or expedited removal.

86. Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 502 U.S. 1122 (1993) (holding that Haitians detained outside the U.S. could not challenge the screening process).

87. 509 U.S. 155 (1993).

88. Koh, *supra* note 23, at 158; Fitzpatrick, *supra* note 30, at 15 (explaining that in *Sale v. Haitian Centers Council* "the Court pointedly ignored the UNHCR's explication of the plain text of Article 33 [of the Refugee Protocol], along with [the UNHCR's] emphasis on the deleterious impact a restrictive territorial reading of Article 33 could have on the international refugee regime").

89. *See* Koh, *supra* note 23, at 169-70.

90. Haitian Ctr. for Human Rights v. United States, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550, ¶ 157 (1997) ("The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court [in *Sale v. Haitian Centers Council*], that Article 33 had no geographical limitations.").

of customary international law, the U.S. policy of interdicting refugees at sea violates its duty of non-refoulement.

Executive orders to deter a mass exodus of refugees are powerful instruments that the judiciary has left unchecked. As a result, asylum seekers and refugees have fewer protections when attempting to reach the United States by sea. The United States has the right to secure the nation's borders, but, that right must be balanced with the duty to provide safe haven consistent with international obligations.

III. OVERVIEW OF THE U.S. ASYLUM SYSTEM

To qualify for asylum, the asylum seeker must show that she meets the definition of a refugee as defined in INA section 101(a)(42)(A),[91] which codifies the definition found in the Refugee Convention. A refugee is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[92]

Eligibility for asylum can be established by either past persecution or a well-founded fear of future persecution.[93] Asylum is a discretionary form of relief from deportation and an asylum seeker must satisfy a host of stringent substantive and procedural requirements.[94]

To show past persecution the alien must establish that she was persecuted by her country's government or by a group the government could not control.[95] Assessing persecution is highly fact intensive and immigration judges evaluate it based on a totality of the circumstances.[96]

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91. 8 U.S.C. § 1101(a)(42) (2005).
92. *Id.*
93. *Id.*; *See* Matter of Chen, 20 I&N Dec. 16-17 (BIA 1989).
94. *See* 8 U.S.C. § 1158 (2005) and 8 C.F.R. § 208.13 (2005). *See generally* ANKER, *supra* note 39, at app. A (providing a step-by-step account of asylum procedures).
95. *See* ANKER, *supra* note 39, at 50-51 (highlighting the importance of case-by-case adjudication to assess whether there is sufficient evidence of past persecution); *see also* 8 C.F.R. § 208.13(b)(1) (2005).
96. The Ninth Circuit has defined persecution as "oppression, which is inflicted on groups of individuals because of a difference that the persecutor will not tolerate." Desir v. Ilchert, 840 F.2d 723, 727 (9th Cir. 1988) (quoting Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)). *See, e.g.*, Duarte de Guinac v. INS, 179 F.3d 1156, 1162 (9th Cir. 1999)

If an alien shows past persecution, she establishes a rebuttable presumption of future persecution.[97] The DHS can rebut the presumption by showing that country conditions have changed such that that the alien no longer has a well-founded fear.[98]

The Supreme Court in *INS v. Cardoza-Fonseca* noted that because the term well-founded fear is ambiguous, it "can only be given concrete meaning through a process of case by case adjudication."[99] An asylum seeker must present direct, credible, and specific evidence of a reasonable fear of persecution.[100] The reasonableness of the fear requires an objective (the reasonable person standard) and subjective (genuine fear) component.[101]

Before Congress passed REAL ID, an individual had to show only past persecution or a well-founded fear of future persecution linked to one of five grounds: race, religion, nationality, membership in a particular social group, or political opinion. Following REAL ID, however, an asylum seeker must establish one of the five grounds "was or will be at least one central reason for persecuting the applicant."[102]

Despite providing thousands of individuals fleeing persecution each year with an opportunity to create a new life, the U.S. asylum process is flawed.[103] There are structural deficiencies, including an initial screening process conducted at airports and border crossing stations by immigration officials who are given conflicting duties of excluding individuals who

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(multiple beatings accompanied by statements of ethnic hatred and death threats constitutes persecution). Threats to one's life or freedom are always considered persecution. INS v. Stevic, 467 U.S. 407, 428, n.22 (1984). Economic harm can rise to the level of persecution in cases where a "deliberate imposition of substantial economic disadvantage" is demonstrated on account of a person's race, religion, nationality, membership in a particular social group or political opinion. Chand v. INS, 222 F.3d 1066, 1074 (9th Cir. 2000) (quoting Kovac, 407 F.2d at 107).

97. *Chen*, 20 I&N Dec. at 18; *see* 8 C.F.R. § 208.13(b)(1) (2005).

98. Singh v. Ilchert, 63 F.3d 1501, 1510 (9th Cir. 1995).

99. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

100. Matter of Mogharrabi, 19 I&N Dec. 439, 443-445 (BIA 1987).

101. *Id.*

102. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2005).

103. *See supra* at 226. For fiscal year 2004, immigration judges received 56,609 asylum cases and granted asylum in 10,839 cases. U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, AND TECHNOLOGY, IMMIGRATION COURTS FY 2004 ASYLUM STATISTICS at http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf. In 2004, the USCIS approved 10,101 affirmative asylum cases. That same year, of the asylum cases referred to an immigration judge for adjudication 12,712 had been previously interviewed by an asylum officer and 3,833 had not been interviewed. OFFICE OF IMMIGRATION STATISTICS, 2004 YEARBOOK OF IMMIGRATION STATISTICS 51, 58 (Jan. 2006). Statistics of asylum approvals or denials should be interpreted with caution. Figures usually do not indicate whether the adjudicator is considering the merits of an asylum case for the first time, or if the case was referred to an immigration judge by an asylum officer who determined that the asylum seeker did not establish a credible fear of persecution.

have no legal right to enter the United States and simultaneously making a preliminary assessment of whether individuals fear returning to their country.[104] Immigration courts are understaffed, immigration judges have heavy caseloads and often have to rely on inadequate documentation, and many asylum seekers do not have legal representation.[105] Those asylum seekers that do have an attorney often do not receive effective assistance of counsel as they may be represented by an unscrupulous individual posing as an attorney or the asylum seeker's attorney may provide unreasonable legal representation.[106] Recent changes have practically eliminated administrative appellate review of immigration judges' decisions.[107] Furthermore, the system produces inconsistent final outcomes as judicial review of immigration judges' decisions varies depending upon the federal circuit court reviewing the decision and asylum grant rates vary greatly.[108] As a result, segments of the U.S. asylum system do not conform with international obligations as evidenced by an asylum process that produces inconsistent and sometimes arbitrary results and fails to provide sufficient procedural safeguards to comply with the duty of non-refoulement.

A. Filing a Defensive Asylum Application

There are three ways to file an asylum application: 1) an affirmative application filed within one year of entering the United States with the Asylum Office under the jurisdiction of the United States Citizenship and Immigration Services ("USCIS");[109] 2) a defensive application

104. *See infra* at 231-32.
105. *See infra* at 230.
106. *See* Anna M. Simmons, *Immigrants Exploited by "Notarios"*, L.A. TIMES, Aug. 10, 2004, at B1. The requirements for filing an ineffective assistance of counsel claim in immigration proceedings are set forth in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988).
107. *See infra* at 229.
108. See discussion *supra* notes 11-12; Pamela A. MacLean, *Wide Disparities Are Found in Granting Asylum*, NAT'L L.J., Aug. 14, 2006, at 1 ("A comprehensive analysis of nearly 300,000 asylum decision by 208 judges over the last five years shows wide disparities in granting asylum, from a low 3% . . . to a high of 89%[.]") These statistics are somewhat misleading as they fail to distinguish between denials on the merits and those where the asylum seeker is statutorily ineligible for relief. Further, these statistics do not reflect the differences in the volume and types of asylum cases based on the geographic location of the immigration court.
109. 8 U.S.C. § 1158(a) & (b)(1) (2005). Note that the Asylum Office can approve, deny, or refer asylum application to an immigration judge for adjudication. 8 C.F.R. § 208.14 (2005). See AFFIRMATIVE ASYLUM PROCEDURES MANUAL, OFFICE OF INTERNATIONAL

during removal proceedings filed with an immigration judge;[110] 3) a defensive application filed at the border during expedited removal proceedings.[111] This Comment will focus on defensive asylum applications.

The DHS commences removal proceedings by issuing an alien a charging document.[112] The hearing before the immigration judge is a due process hearing.[113] The immigration judge, as the Attorney General's delegate, may grant or deny asylum.[114] If an asylum seeker is considered an arriving alien, she is placed in expedited removal proceedings under INA section 235(b)(1) and may be detained for the course of the proceedings.[115] If an asylum seeker has already been admitted to the United States or establishes that she has been living in the United States continuously for 2 years before the date she was determined inadmissible, she is placed in removal proceedings under INA section 240, which contains greater procedural safeguards than expedited removal proceedings.[116]

As related to asylum seekers, a major distinction between removal proceedings and expedited removal proceedings is that in the latter an asylum seeker must first pass a credible fear interview with an asylum officer before being entitled to a due process hearing before an immigration judge.[117] The credible fear interview before a USCIS asylum officer is non-adversarial, whereas, the hearing is adversarial before an immigration judge.[118]

Although the proceedings are civil proceedings, the consequences can be severe. While an asylum seeker can hire counsel to appear at the asylum interview with USCIS or during removal proceedings before the Immigration Court, which is under the Executive Office for Immigration Review ("EOIR"), an agency within the Justice Department, counsel

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AFFAIRS ASYLUM DIVISION (Feb. 2003) (describing the processing of affirmative asylum applications by the asylum office).

110. 8 C.F.R. §§ 1208.2, 1208.4 (2005).

111. *See* 3-34 GORDON ET AL., *supra* note 49 at § 34.02. For a description of expedited removal see *supra* at 218-19.

112. 8 C.F.R. § 239 (2005).

113. Reno v. Flores, 507 U.S. 292, 306 (1993); *see* 3-34 GORDON ET AL., *supra* note 49, at § 34.02; *see id. at* 1-9, § 9.06 (outlining the minimum requirements of due process proceedings based on *Mathews v. Eldridge*, 424 U.S. 319 (1976),

> which requires a court to consider (1) the individual's interest that will be affected by official action; (2) risk of erroneous deprivation of that interest through establishing procedures, and the gain to decisionmaking accuracy of additional or substitute procedural safeguards; and (3) the government's interest, including administrative and fiscal costs, in avoiding the burdens of the proposed new safeguards).

114. 3-34 GORDON ET AL., *supra* note 49, at § 34.02.

115. *Id.*; *see* Craig Haney, *supra* note 54, at 197-99.

116. *See* 3-34 GORDON ET AL., *supra* note 49, at § 34.02.

117. ANKER, *supra* note 39, at app. A.

118. *See* 3-34 GORDON ET AL., *supra* note 49, at § 34.02.

will not be provided at government expense.[119] Many asylum seekers are unable to afford an attorney and must navigate the process without the assistance of counsel, which significantly reduces the chances of a successful asylum claim.[120] "During [Fiscal Year] 1999-2003, only forty-two to forty-eight percent of non-citizens had representation."[121] A study has found that in cases where asylum applications are referred to the Immigration Court, asylum seekers are six times more likely to be granted asylum if they have an attorney.[122]

As discussed in this section, asylum seekers must overcome many procedural and administrative hurdles including: 1) the complexity of the asylum system; 2) lack of legal representation and difficulty finding a qualified attorney; 3) a merits hearing on the asylum claim which often yields inconsistent results; and 4) lack of significant judicial review of a discretionary determination by the adjudicator.

B. Overhauling Executive Agencies

Until the Refugee Act of 1980 added INA section 208, asylum was an informal procedure administered by the INS without direct statutory authority.[123]

> The Refugee Act of 1980 adopted from the [Refugee] Convention the definition of 'refugee,' which lies at the core of both asylum and refugee status, and the Convention's fundamental obligation of protection against return or non-refoulement that forms the basis of the U.S. statutory withholding of removal protection.[124]

Before 1980, "[t]he courts concluded that the INS's asylum procedure created no new rights, but merely implemented existing rights under the INA and the 1951 United Nations Convention relating to the Status of Refugees and the 1967 United Nations Protocol relating to the Status of Refugees[.]"[125]

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119. *See* 8 C.F.R. § 208.30 (2005) regarding credible fear interviews and 8 C.F.R. § 1240.10 (2005) regarding removal proceedings.
120. *See* Schoenholtz, *supra* note 33, at 351.
121. *Id.*
122. *Id.*
123. Pub. L. No. 96-212 § 201(b), 94 Stat. 102 (1980); *see* Deborah Anker & Michael Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1986).
124. ANKER, *supra* note 34, at 3.
125. 3-33 GORDON ET AL., *supra* note 49, at § 33.05.

After 1980, INA section 208 provided direct statutory authority for asylum, authorizing the Attorney General discretion to grant asylum.[126] As administrative law, asylum law and procedures traverse several federal agencies, most notably DHS and EOIR, which is within the Justice Department.[127] Since 2003 the Secretary of Homeland Security also has authority to delegate some powers relating to the granting of affirmative asylum applications and detention to various DHS components, including the United States Citizenship and Immigration Services ("USCIS") and Immigration and Customs Enforcement ("ICE").[128]

1. Dismantling the Immigration and Naturalization Service

Calls to reform the INS, the primary agency charged with enforcement activities, which had become an unmanageable bureaucracy, grew throughout the 1990s.[129] The September 11, 2001 attacks on the World Trade Center triggered the formation of a new executive agency charged with overseeing immigration and border security to replace the INS.[130] Commentators are skeptical that the new executive agency will significantly overhaul the inefficient administration of immigration and asylum law and procedures.[131]

2. The Board of Immigration Appeals Has Become a "Rubber Stamp"

Critics denounced former Attorney General Ashcroft's policies aimed at reducing the backlog of immigration cases as having effectively eliminated the administrative appeal process.[132] Under Ashcroft, the

126. INA § 208(b), 8 U.S.C. § 1158(b) (2005), sets forth that: "The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien . . ." (emphasis added); *see* 8 C.F.R. § 1208.13(b)(1)(iii)(A) (2005); *see also* Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996).

127. *See* Executive Office of Immigration Review, *Background Information, available at* http://www.usdoj.gov/eoir/background.htm (last visited October 24, 2006); *see generally* USCIS, *INS to DHS Roadmap, available at* http://uscis.gov/graphics/othergov/roadmap.htm (last visited Oct. 24, 2006).

128. *See generally* 8 C.F.R. §§ 100.2 and 103 (2005). For jurisdiction in asylum cases, see 8 C.F.R. § 208.2 (2005). *See also* 1-1 GORDON ET AL., *supra* note 49, at § 1.02; INA § 208, 8 U.S.C. § 1158 (2005) has been amended to reflect that the Secretary of Homeland Security has authority to grant asylum.

129. *See* Thomas W. Donovan, *The American Immigration System: A Structural Change With a Different Emphasis*, 17 INT'L J. REFUGEE L. 574, 577-78 (2005).

130. *Id.*

131. *Id.* at 592.

132. Eleanor Acer, *Fairness Sacrificed: Recent Changes to the U.S. Asylum System, in* 24 IN DEFENSE OF THE ALIEN 163, 164 (Joseph Fugolo ed., 2003). *But see* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 94 ("appeal rate has increased as a result of a surge in

number of judges at the Board of Immigration Appeals ("BIA") was halved and procedures were implemented to allow "affirmance without opinion," also known as summary affirmance, of the immigration judge's findings.[133] The number of cases where the BIA granted asylum on appeal declined.[134] Federal appellate courts have held that BIA policies for streamlining appeals do not violate due process.[135]

An asylum seeker can appeal an immigration judge's denial of asylum to the BIA. "Historically, the BIA has been the single most important decision-maker in the immigration system. It reviews cases nationwide and sets precedents that immigration judges and asylum officers must follow."[136] The absence of effective appellate review of administrative law decisions by the BIA has had a major impact on U.S. immigration and asylum law. Seventh Circuit Judge Diane P. Wood has referred to the BIA as a "rubber stamp" because the BIA often does not reveal how it reached its decision.[137]

Recently, the Ninth Circuit, among other circuits that have seen a huge increase of immigration cases in their dockets, criticized the state of the record when it reaches the Court and the BIA's summary affirmance policy.[138] The majority of Ashcroft's changes at the BIA were driven in part by a desire to reduce the backlog of cases; some had been pending

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BIA decisions that leave non-detained aliens with final expulsion orders and a fundamental shift in behavior among lawyers and their clients, causing them to focus their litigation in the courts of appeals for the first time").

133. Acer, *supra* note 132 (discussing reduction in the number of judges at the BIA from 23 to 11 and describing the increased use of immigration judges' decisions receiving "affirmance without an opinion" by the BIA).

134. *Id.*

135. *See* Zhang v. U.S. Dep't. of Justice, 362 F.3d 155, 156-57 (2d Cir. 2004), *citing* Yuk v. Ashcroft, 355 F.3d 1222, 1229-32 (10th Cir. 2004); Loulou v. Ashcroft, 354 F.3d 706, 708-09 (8th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 849-52 (9th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 966-67 (7th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1288-89 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 831-33 (5th Cir. 2003); Albathani v. INS, 318 F.3d 365, 375-79 (1st Cir. 2003); Khattak v. Ashcroft, 332 F.3d 250, 252-53 (4th Cir. 2003).

136. Schoenholtz, *supra* note 33, at 352-53.

137. *Changes for Immigration Appeals*, CHICAGO LAW., Feb. 2006, at 25.

138. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed—Ashcroft's Goal To Clear a Backlog of Immigration Appeals Has Board Members Deciding Cases in Minutes. Increasingly Foreigners Are Losing*, L.A. TIMES, Jan. 5, 2003 (criticizing Ashcroft's method for reducing backlog of immigration cases); Mintz, *supra* note 11.

for up to three years.[139] The delay is even more troubling considering that many asylum seekers are detained pending the final outcome of their case. Onerous delays adjudicating asylum applications and allegations of systemic bias have also led to class action lawsuits, like the ABC settlement in 1995 which required the INS to readjudicate the asylum claims of certain Salvadorans and Guatemalans who alleged INS policies and practices violated equal protection.[140]

Attorney General Gonzales recently increased the number of judges on staff at the BIA in response to the growing dissatisfaction among circuit court judges with the lack of administrative appellate review.[141]

3. Scrutinizing Immigration Judges

For the past couple years immigration judges have come under increased attack by the judiciary, especially by justices in Ninth and Third Circuits who are frustrated with the heavy immigration caseloads and the shoddy state of the record when it reaches the circuit courts of appeals. There are approximately 215 immigration judges in the United States who are responsible for around "300,000 cases a year—an average of 1,395 each."[142] Federal appellate judges have condemned the poor quality of the immigration record on appeal and immigration judges' lack of adequate consideration of asylum cases.[143] However, some commentators familiar with the caseload pressures on immigration

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139. Department of Justice, Proposed Rule *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, AG Order No. 2559-2002, RIN 1125-AA36, EOIR 131P, 67 Fed. Reg. 7309 (Feb. 19, 2002).

140. American Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799-800 (N.D. Cal. 1991); *see* Smith & the ABC Legal Team, *The ABC Settlement: A Guide for Class Members and Advocates*, 72 Interpreter Releases 1497 (Nov. 6, 1995).

141. Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, at A14.

142. Schwartz, *supra* note 12. For fiscal year 2005, immigration judges received 50,753 asylum cases and granted asylum in 10,164 cases. U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, AND TECHNOLOGY, IMMIGRATION COURTS FY 2005 ASYLUM STATISTICS, at http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf. *See* Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655 (2006).

143. *See* Pamela A. MacLean, *Immigration Bench Plagued by Flaws: Due Process Abuse, Bad Records Alleged*, NAT'L L.J., Feb. 6, 2006, at 1; Pamela A. MacLean, *Immigration Judges Come Under Fire*, NAT'L L.J., Jan. 30, 2006, at 1; Pamela A. MacLean, *Judges Blast Immigration Rulings*, NAT'L L.J., Oct. 24, 2005, at S1. *See also* Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 No.48 Interpreter Releases 2005, Dec. 19, 2005; Pamela A. MacLean, *supra* note 108.

judges to render oral decisions at the end of proceedings highlight the structural constraints on the nation's Immigration Courts.[144]

In January 2006, Attorney General Gonzales ordered an investigation of the immigration courts, specifically focusing on the immigration judges and the BIA.[145] Attorney General Gonzales announced in August 2006 that immigration judges that were selected in the future would be required to pass an exam in immigration law.[146] In addition, all immigration judges will be subject to performance evaluations, however, it is still not certain how the process will be administered.[147]

C. Assessing Asylum-Seekers' Credibility

As discussed at the beginning of section II, an asylum seeker has the burden of proof to show that he has suffered "past persecution" or has a "well-founded fear" of future persecution.[148] These standards are highly fact specific, require consideration of a totality of the circumstances, and are adjudicated on a case-by-case basis. Increasingly the U.S. public has become suspicious of asylum seekers viewing many as either undeserving, trying to manipulate U.S. laws to gain entry and burden public services, or terrorists seeking to harm the United States.[149] Several commentators have noted that the Refugee Convention grew out of a concern with relocating post-war Europe and that as the number of refugees from countries other than Europe continued to grow, vast barriers were created to stem the flow from non-European countries.[150] In this era of increased focus on national security, many wonder how much longer Westernized countries will provide safe haven to those fleeing persecution.

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144. *See* Schoenholtz, *supra* note 33, at 356.

145. Howard Mintz, *U.S. Attorney General: Court Must Stop Mistreating Immigrants*, S.J. MERCURY-NEWS, Jan. 11, 2006, at A1.

146. Bernstein, *supra* note 141.

147. *Id.*

148. *See* 8 C.F.R. § 208.13 (2005).

149. *See* Schoenholtz, *supra* note 33; *see generally* SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY 10-13 (2000). Fear of fraudulent applications is not limited to asylum claims. A Special Agricultural Worker ("SAW") provision of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986), which granted amnesty to certain agricultural worker is often cited as a prime example of the problem with fraudulent applications. However, by far the most prevalent fraud in the SAW program was committed by farm labor contractors or farm owners who sold their affidavits to aliens.

150. *See* Jerzy Sztucki, *Who is a Refugee? The Convention Definition: Universal or Obsolete?*, *in* REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 55 (Frances Nicholson & Patrick Twomey eds., 1999).

Asylum officers' bias against asylum seekers undermined the reliability of asylum officers' credible fear determinations prompting the DHS to implement anti-bias training for asylum officers.[151] The documentary *Well-Founded Fear* excellently portrays some major problems with the asylum system such as the differing worldviews of asylum seekers and asylum officers who often perfunctorily assess credibility with an unrealistic expectation that asylum seekers will be able to provide corroborating evidence.[152]

Given the widespread doubts about the truthfulness of asylum seekers' claims of past persecution or fear of future persecution, and bias affecting decision-makers, one commentator has advocated establishing a presumption of credibility.[153] The U.S. Commission on International Religious Freedom ("USCIRF") found that immigration officials involved at the initial stages of asylum processing did not properly document their screening of asylum seekers' claims and that this inadequate documentation negatively impacted asylum seekers' credibility determination later in the process.[154] The USCIRF's experts specifically found that immigration judges frequently cited to these unreliable and incomplete documents when denying asylum.[155] In a confidential study on expedited removal, the United Nations High Commissioner for Refugees ("UNHCR") found that:

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151. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 2002 ANNUAL REPORT 38-39 (May 2002) (discussing the implementation of anti-bias training in response to abuses by asylum officers).

152. *Well-Founded Fear* (PBS television broadcast, June 5, 2000). More information about this documentary is *available at* http://www.pbs.org/pov/pov1999/wellfoundedfear/home.html (last visited Jan. 22, 2006).

153. Ilene Durst, *Lost In Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127 (2000) (advocating a presumption of credibility to individuals seeking asylum because of the biases that the average adjudicator harbors prevents a fair credibility evaluation). "[A] refugee's testimony should not be rejected in the absence of clear and convincing evidence of material misrepresentations." *Id.* at 128.

154. USCIRF is a federal government commission, created by Congress in 1998, to monitor religious freedom around the world and advise the President, the Secretary of State, and Congress on religious freedom. Under the International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat 2787 (1998),

> Congress authorized the USCIRF to appoint experts to examine whether immigration officers, in exercising Expedited Removal authority over aliens who may be eligible for asylum, were:
>
> (1) Improperly encouraging withdrawals of applications for admission;
> (2) Incorrectly failing to refer such aliens for credible fear determinations;
> (3) Incorrectly removing such aliens to countries where such aliens may face persecution; or
> (4) Improperly detaining such aliens, or detaining them under inappropriate conditions.

REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, *supra* note 56, at 1, 3-4.

155. *Id.* at 5.

> [m]any [airport] inspectors held negative views of asylum seekers, considering them to be frauds. The report concluded that this attitude resulted in instances where inspectors intimidated asylum seekers or treated them with derision.[156]

Fear of fraudulent asylum claims, a potential bias, adversely affects neutral evaluation of asylum seekers' credibility.

To combat fraud, asylum restrictionists advocated the increased reliance on statutory bars to preclude reaching the merits of asylum seekers' claims. Restrictionists argue that an asylum seeker who genuinely fears for her life would immediately, or within a reasonable time deemed to be one year, apply for asylum.[157] Asylum seekers must show by "clear and convincing evidence" that their application was filed within one year of arriving in the United States.[158] Absent extraordinary circumstances or changed conditions, an asylum seeker who misses the one year filing deadline will not be eligible for asylum.[159] Thus, a factor that may reflect credibility, the amount of time elapsed before applying for asylum, is now being used to preclude reaching the merits of an asylum claim. Such an expansion of statutory bars to asylum is contrary to international standards recognizing a right to asylum.[160]

The UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* ("*Handbook*"),[161] states that credibility doubts should be resolved in favor of the asylum seeker. Numerous factors affect an evaluation of an asylum seeker's credibility, including "differences in cultural norms, the effect of an asylum seeker's past traumatic experiences and flight on her ability to recall events, language barriers, the adversarial nature of the hearing, the asylum seeker's limited access to

156. Schoenholtz, *supra* note 33, at 333 (citing Rachel L. Swarns, *U.N. Report Cites Harassment at American Airports of Asylum Seekers*, N.Y. TIMES, Aug. 13, 2004, at A11).

157. Schoenholtz, *supra* note 33, at 333.

158. IIRIRA imposed the statutory bar on asylum applications requiring filing within one year of arrival in the United States. *See* INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2005).

159. *See id.* Opponents of the one year filing bar note that while its purpose was to discourage fraudulent asylum claims, immigration judges and asylum officers' restrictive interpretation has produced numerous denials of bona fide asylum claims. Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 IMMIGR. BRIEFINGS 1 (Aug. 2005).

160. Coffey, *supra* note 72.

161. Office of the United Nations High Comm'r for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/ENG/REV.1 (re-edited 1992) ¶ 196 [hereinafter "HANDBOOK"].

legal counsel, and the adjudicator's sometimes inaccurate perceptions of foreign culture and politics."[162] The proliferation of more stringent requirements for corroborating evidence[163] runs contrary to UNHCR guidance.

While the Supreme Court has upheld the persuasive authority of UNHCR documents,[164] they are not binding on U.S. courts.[165] There is some effort to comply with the UNHCR as the organization's sources are persuasive. However, the degree of persuasiveness of UNHCR materials or how international law will be treated by Congress or in U.S. courts is debatable. A recent example of the limitation of relying on international treaties, such as the Convention Against Torture, to advance international law principles is the failure to have Congress pass legislation banning the torture of detainees suspected of terrorism.[166] Nonetheless, the United States continues to recognize a commitment to the UNHCR as evidenced by its over $200 million dollar contribution to support the organization's 2006 operations.[167]

D. Detention of Asylum-Seekers

INA sections 208 and 235 authorize the detention of asylum seekers who request asylum at the border or airport or who are placed in removal proceedings before an immigration judge. The policy of detaining asylum seekers aims to discourage large numbers of refugees from arriving on U.S. shores.[168] DHS[169] has broad discretion to determine based on humanitarian reasons whether to parole an asylum seeker into the

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162. ANKER, *supra* note 39, at 153.

163. *See, e.g.*, H.R. CONF. REP. NO. 109-072, *supra* note 10 (listing heightened credibility standards enacted in REAL ID).

164. INS v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987).

165. INS v. Aguirre, 526 U.S. 415, 427-28 (1999) ("U.N. Handbook may be a useful interpretive aid, but it is not binding on the Attorney General, the BIA, or United States courts.").

166. *See, e.g.*, Carl Hulse & Eric Schmitt, *Negotiators Say Differences Over Ban on Abuse Remain*, N.Y. TIMES, Dec. 12, 2005, at A19. *See also* HUMAN RIGHTS FIRST, BEHIND THE WIRE (March 2005), *available at* http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf (last visited Jan. 10, 2006). Besides international treaties on the subject, the failure to ban torture of detainees is even more troubling considering that the ban on torture is a *jus cogens*, a mandatory norm of international law.

167. U.S. Contributes $203.8 Million to the United Nations High Commissioner for Refugees, State Department website, at http://www.state.gov/r/pa/prs/ps/2006/60788.htm (last visited Oct. 17, 2006).

168. *See* ANN VIBELKE EGGLI, MASS REFUGEE INFLUX AND THE LIMITS OF PUBLIC INTERNATIONAL LAW (2002).

169. DHS took over INS functions in 2003; *see supra* note 41 and accompanying text.

country.[170] DHS also has broad discretion to set the amount of bond that the asylum seekers should post in the event that the agency determines that they can be paroled into the country. Moreover, the anti-terrorism provisions in the Patriot Act[171] gives the Attorney General and Secretary of Homeland Security "unprecedented power to detain aliens without a hearing and without a showing that they pose a threat to national security or a flight risk."[172]

Prolonged detention has a harmful psychological effect on asylum seekers and violates international law.[173] Furthermore, policies and procedures for detaining asylum seekers awaiting adjudication of their applications are not uniform across the country.[174] For example, in Miami "release is the norm (unless you are Haitian) [whereas] [i]n New York, [requirements for] release [are] much more stringent[.]"[175] In addition, a blanket detention policy, known as Operation Liberty Shield, has resulted in the prolonged detention of nationals from 34 countries deemed sympathetic to Al Qaeda.[176] Some of the countries included in the blanket detention policy are countries from which many people flee persecution, including Somalia, Sudan, Afghanistan, Iran, Ethiopia, Eritrea, and Iraq.[177]

Human Rights First documented difficulties that asylum seekers face in expedited removal procedures and in immigration jails in its January 2004 report *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security.*[178] The USCIRF, after extensive study, "found that asylum seekers are consistently detained in jails or jail-like

170. Wendy Young, *Detention of Asylum Seeking Minors*, *in* 24 IN DEFENSE OF THE ALIEN 121, 123 (Joseph Fugolo ed., 2003).

171. Title IV, § 412(a) of the Patriot Act amended 8 U.S.C. § 1226A(a) (2001), which is titled "Mandatory Detention of Suspected Terrorists."

172. Cole, *supra* note 7, at 971.

173. AMNESTY INT'L, UNITED STATES OF AMERICA: LOST IN THE LABYRINTH: DETENTION OF ASYLUM-SEEKERS 39-44, 54-59 (1999) (unaccompanied minors are detained and under the care of the State Department's Office of Refugee Resettlement); MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 1-19 (2004).

174. Young, *supra* note 170.

175. *Id.*

176. *Id.* at 124.

177. *Id.*

178. HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY (Jan. 2004), *available at* http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf (last visited Oct. 17, 2006) [hereinafter "U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY"].

facilities, which the experts found inappropriate for non-criminal asylum seekers."[179] The USCIRF and Human Rights First recommend that DHS create a high-level refugee and asylum protection position and formal regulations to ensure that those seeking asylum are not needlessly jailed.[180]

A major flaw of the expedited removal system is that DHS' power to detain and determine who has a credible fear of returning to their country of origin is unchecked and there are insufficient safeguards for asylum seekers.[181] The detention of asylum seekers who are considered arriving aliens because they arrive at U.S. ports-of-entry without valid documentation to enter the United States dates back at least as far as IIRIRA.[182] The "expedited removal" provisions of that law, which went into effect in April 1997, have resulted in lengthy detentions of asylum seekers who flee to the United States without valid travel documents.[183]

In addition, the growth in the number of people detained by DHS has outpaced detention space at DHS facilities. In response, DHS has obtained bed space with private detention facilities and jails.[184] Commentators have noted the disparity between the treatment of detainees at DHS facilities versus the sub-standard treatment of them at private facilities or jails.[185] Public scrutiny of the 9/11 investigation concerning the treatment of immigration detainees prompted an Inspector General's report, which found numerous violations of detainee processing.[186]

The Patriot Act allowed for the mandatory detention of aliens certified by the Attorney General.[187] However, in 2001 *Zadvydas v. Davis*[188]

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179. REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, *supra* note 56, at 4.

180. *Id.* at 5; U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY, *supra* note 178.

181. Erin M. O'Callaghan, *Expedited Removal and Discrimination in the Asylum Process: the Use of Humanitarian Aid as a Political Tool*, 43 WM. & MARY L. REV. 1747, 1748 (2002). "The problems [with the expedited removal process] stem from the true refugee's lack of reviewability after being rejected from the system, coupled with the inadequacy of the system to deal with new forms or sources of persecution." *Id.* at 1770.

182. 8 U.S.C. § 1225(b)(1)(B)(ii) (1996) [INA § 235(b)(1)(B)].

183. HUMAN RIGHTS FIRST, THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES (Oct. 2000), *available at* http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm (last visited Oct. 17, 2006).

184. Smith, *supra* note 55, at 788.

185. *Id.*

186. *Id.* at 789-90. The federal government has paid $300,000 to settle a lawsuit brought by a detainee who was abused and held for months at a federal detention center in Brooklyn, which is one of the sites described in the Inspector General's 2003 report. Nina Bernstein, *U.S. Is Settling Detainee's Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, at A1.

187. Cole, *supra* note 7, at 971.

188. 533 U.S. 678 (2001) (extended to apply to inadmissible aliens by *Clark v. Martinez*, 543 U.S. 371 (2005)).

altered DHS detention policies and procedures when an immigration judge issues an order of removal and the alien has been detained beyond the 90-day removal period.[189] The Supreme Court held that DHS may only detain aliens beyond the 90-day removal period for a time reasonably necessary to effectuate the alien's repatriation. The Court established six months as the default for a reasonable period.[190] Even after six months, DHS is not required to release the detained alien unless "there is no significant likelihood of removal in the reasonably foreseeable future."[191] The Court's holding did not address aliens who pose a national security risk "where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[192]

E. Due Process and Restricting Judicial Review

1. Due Process and the Asylum System

Providing an overview of the U.S. asylum system requires an examination of the procedural fairness of the process and the role of judicial review. In filing defensive asylum applications, asylum seekers are often in a legal limbo because they are physically present in the United States, often in federal custody, but they have not been admitted into the country for purposes of legal protection.[193] As such, the asylum seeker detained at the border may not be entitled to the same level of constitutional due process as an asylum seeker who was admitted to the United States on a tourist visa and filed an affirmative asylum application with the USCIS. This concept of a legal limbo status refers to the entry fiction doctrine where courts treat aliens who are physically present on U.S. soil as outside the United States for purposes of legal protections.

189. Rachel Canty, *The New World of Immigration Custody Determinations after Zadvydas v. Davis*, 18 GEO. IMMIGR. L.J. 467, 482 (2004). *See* Determination of Whether There Is a Significant Likelihood of Removing a Detained Alien in the Reasonably Foreseeable Future, 8 C.F.R. § 241.13 (2005).

190. *Zadvydas*, 533 U.S. at 701.

191. *Id.*

192. *Id.* at 696.

193. Allison Wexler, Note, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas*, 25 CARDOZO L. REV. 2029, 2034 (2004) ("These individuals, waylaid at the country's boundaries, may be detained within the United States awaiting removal, but are not considered 'within' the country for due process purposes.").

> Until 1996, "entry" constituted the dividing line between those aliens who received a constitutional right to procedural due process, and those who did not. An alien's legal standing, his access to the court system and claim to constitutional rights were contingent on whether the alien was considered to have "entered" the country. However, the Supreme Court has held that mere physical presence within the United States is not always enough to qualify an alien as having entered the United States.[194]

Following IIRIRA in 1996, the term "entry" was replaced with the term "admitted."[195]

While the Supreme Court recognized in *Zadvydas* that a person in the United States regardless of legal status is protected by constitutional due process, this protection does not apply to an alien who is considered to have *not* "entered" or been "admitted" to the United States.[196] Thus, an asylum seeker who applied for asylum at the border or airport and has been paroled or detained pending her asylum proceedings has not been "admitted." Such an asylum seeker is only entitled to the due process afforded her by Congress.[197] Asylum and immigration law is an area where the Supreme Court's adherence to the plenary power doctrine and deference to congressional decision-making is particularly strong.[198]

In the U.S. asylum is not construed as a right, but rather, a privilege.[199] As such, the Eleventh Circuit remarked that "[a]liens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges are granted by Congress."[200] The procedural fairness of the asylum system is at the mercy of legislators who are often influenced by groups seeking to further restrict asylum laws. In addition, one legal scholar has underscored that the Supreme Court's deference to the legislative branch because of the plenary power doctrine and increased reliance on the procedural due process exception has led to the absence of substantive constitutional scrutiny in asylum matters.[201] "Heavy reliance on procedural due process also prompts Congress and judges . . . to search for ways to limit the group of aliens entitled to invoke it, such as creating more restrictive 'substantive' exclusion and deportation categories."[202]

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194. *Id.* at 2038 (citations omitted).
195. *Id.*
196. *Id.*
197. *Id.* at 2058.
198. *See id.*
199. Landon v. Plascencia, 459 U.S. 21 (1982). *Plascencia* "marked the arrival of the due process revolution [following *Mathews v. Eldridge*] in immigration law." Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1652 (1992).
200. Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984). *See* Coffey, *supra* note 72.
201. Motomura, *supra* note 199, at 1628-30.
202. *Id.* at 1701.

Thus, the one year statutory bar to filing asylum claims provides a poignant example of how a "procedure" may preclude a "substantive" right of presenting an asylum claim. An immigration judge's decision that an asylum claim is barred because of failure to meet the one year filing requirement is not reviewable.[203]

The requirements of due process are flexible and contingent upon the circumstances of the case or proceeding.[204] At a minimum, however, under federal agency regulations, asylum seekers must be notified of the charges against them, have a right to a fair hearing, including presenting witnesses, have a right to adequate translation of the proceedings, and have a right to appeal.[205] Federal appellate judges have held that many asylum seekers have been denied a fair hearing.[206]

2. Restricting Judicial Review

IIRIRA[207] and AEDPA[208] restricted judicial review of deportation decisions and narrowed the class of aliens eligible for a discretionary waiver of deportation. IIRIRA "repealed the INA's section on judicial review and eliminated judicial review for criminal aliens."[209] This law also raised the standard of review for reversing the immigration judge's findings to if a "reasonable adjudicator would be compelled to conclude to the contrary."[210] Commentators highlighted the "lack of administrative and judicial review" in expedited removal as a highly controversial

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203. Khandwala et al., *supra* note 159.
204. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
205. *See* 1-9 GORDON ET AL., *supra* note 49, at § 9.06; 8 C.F.R. §§ 1003.12-42 (2006) (listing Immigration Court rules of procedure).
206. For examples of due process violations from denial of a fair hearing, see Colmenar v. INS, 210 F.3d 967, 971-72 (9th Cir. 2000) (petitioner precluded from testifying on key issues); Jacinto v. INS, 208 F.3d 725, 728-32 (9th Cir. 2000) (immigration judge inadequately explained the procedures of the hearing to an unrepresented alien, failed to inform her she had a right to counsel and to present testimony, and failed to explain any of her rights); Castillo-Villagra v. INS, 972 F.2d 1017, 1021 (9th Cir.1992) (precluded from presenting rebuttal evidence in asylum hearing); Rivera-Cruz v. INS, 948 F.2d 962, 968 (5th Cir.1991) (same). *See also supra* text accompanying note 143.
207. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).
208. Pub. L. No. 104-132, 110 Stat. 1214 (1996). AEDPA "eliminated judicial review of deportation based on aggravated felonies, drug convictions, crimes of moral turpitude, and other crimes, even for long-term permanent residents." Lofgren, *supra* note 46, at 368.
209. Lofgren, *supra* note 46, at 369.
210. *Id.*

provision of IIRIRA.[211] INA section 208(a)(3) sets forth: "No court shall have jurisdiction to review any determination of the Attorney General under [section 208(a)(2)]."

Four years after IIRIRA's enactment, the Supreme Court in a five to four decision in *INS v. St. Cyr*[212] examined Congress' intent in IIRIRA and AEDPA. The Court determined that it still had habeas jurisdiction in immigration cases, under the general habeas corpus statute.[213] A scholar in the immigration law field welcomed the Court's decision suggesting that it marked a retreat from the judiciary's long-standing deference to legislative and executive pronouncements in immigration regulation.[214] Another saw the Court's decision as leading to potential misuse by individuals trying to frivolously delay the deportation process.[215]

Judicial review in the immigration and asylum context is critically important to counteract the court's traditional deference to Congress under the plenary power doctrine.[216] One legal scholar has noted that "procedural due process has served . . . as a 'surrogate' for the substantive judicial review that the plenary power doctrine seems to bar."[217] Three factors influence the decline of judicial review in immigration cases: "external influences on judicial decisionmaking in the immigration context; the (qualified) political advantages to elected representatives in taking a 'tough' line on immigration; and legitimate, but sometimes overstated, concerns about the fiscal and institutional costs of judicial review."[218] In reviewing the erosion of judicial review in the wake of AEDPA and IIRIRA, one legal scholar concludes that judicial review serves as a check on the administrative adjudicator and plays a pivotal role in guaranteeing "procedural justice."[219] Congresswoman Lofgren in analyzing the past decade of "radical change in immigration law" explains that an irony of the restriction of judicial review is that in cases where it remains "aliens have taken great advantage of it because administrative relief is so limited."[220]

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211. Benson, *supra* 51, at 1449.
212. INS v. St. Cyr, 533 U.S. 289 (2001).
213. *Id.* at 313-16, 326. The general habeas statute is located in 28 U.S.C. § 2241 (2005).
214. Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 271 (2002).
215. David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to do in the Aftermath of St. Cyr and Nguyen*, 16 GEO. IMMIGR. L.J. 313 (2002).
216. Stephen Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616 (2000); *see also* Chae Chan Ping v. United States, 130 U.S. 581 (1889).
217. Motomura, *supra* note 200, at 1628.
218. Legomsky, *supra* note 216, at 1624-25.
219. *Id.* at 1631-32.
220. Lofgren *supra* note 46, at 370.

An aspect of procedural justice often overlooked is appellate judges' role in creating precedential decisions by deciding whether to issue a published or unpublished opinion. Examining the Ninth Circuit's record of deciding whether or not to publish asylum decisions, a legal scholar concluded that "voting and publication, are for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the decision remains unpublished, but can be driven to dissent if the majority insists upon publication."[221] Therefore, an analysis of the procedural fairness of the asylum process should consider variables underlying judicial review, including factors like publication that influence appellate judges' decisionmaking.

IV. THREE RESTRICTIVE PROVISIONS OF REAL ID

REAL ID restricts asylum eligibility.[222] REAL ID casts a shadow on the future of U.S. asylum policy and suggests that future legislation to restrict asylum under the guise of national security will follow.[223] Congresswoman Lofgren views REAL ID as an unnecessary measure that will "do[] nothing to make us safer."[224] On the other hand, Congressman Sensenbrenner, who introduced the legislation, proclaimed that REAL ID would toughen border security and improve the asylum system thereby making the country safer.[225] Interestingly, former INS Commissioner Meissner stated that the "asylum system is not a weak link in our nation's immigration system" and that REAL ID establishes legal burdens that harm asylum seekers.[226] The following section examines three aspects of REAL ID: the heightened burden of proof, credibility, and

221. David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 820 (2005) ("the publication rate for asylum appeals in the Ninth Circuit is approximately half the overall publication rate."). However, the role of publication for establishing precedent in asylum law should not be over-emphasized as asylum claims require a highly fact intensive analysis on a case-by-case basis. *Id.* at 831.

222. REAL ID was enacted May 11, 2005. *See supra* text accompanying note 2.

223. *See* Cianciarulo, *supra* note 37, at 101. "[S]everal areas of poor drafting [in REAL ID], combined with legislative history mischaracterizing the asylum system as a haven for terrorists and suicide bombers, may result in the denial of bona fide asylum applications."

224. Lofgren, *supra* note 46, at 376.

225. House Passes Real ID, *supra* note 1.

226. Doris Meissner, *Not Broke, Don't Fix*, WASH. TIMES, Feb. 20, 2005, *at* http://www.washtimes.com/commentary/20050219-092415-7342r.htm.

corroborating evidence standards; stripped judicial review of final orders of removal; and expanded terrorist-related bars to asylum.[227]

A. Escalated Burden of Proof, Credibility, and Corroborating Evidence Standards

REAL ID Section 101 relates to the escalated burden of proof as well as heightens credibility and corroborating evidence standards.[228] In particular, section 101(a)(3) requires that the asylum seeker show that one of the five enumerated grounds (race, religion, nationality, membership in a particular social group or political opinion) "was or will be at least one central reason" for the persecution.[229] Prior to REAL ID, asylum seekers could establish eligibility for asylum by showing a mixed-motive for the persecution, albeit the results varied depending upon which Circuit Court of Appeals was binding on the Immigration Court. For example, some claims involving persecutory intent related to an enumerated ground as well as a law enforcement or military recruitment motive.[230] Even before REAL ID, a claim failing to establish a nexus between an enumerated ground and the persecution would fail. However, depending upon its implementation, REAL ID may eliminate mixed-motive asylum claims through the requirement that the enumerated ground be "one central reason" for the persecution.[231]

Legal scholar Cianciarulo, who analyzed the asylum related provisions of REAL ID, provides a compelling argument that the substitution of "at least one central reason" does not raise the asylum seeker's burden of proof because that language is based on DHS' misunderstanding of the term "root of persecution" in *Gebremichael v. INS.*[232] However, based

227. *See REAL ID Now the Law*, *supra* note 15. Areas where REAL ID might improve the asylum process involve the elimination of caps on adjustment of status for asylees and on the number of refugees or asylees claiming eligibility based on coercive population control. *See* REAL ID §§ 101(g)(1) and (2) (codified at 8 U.S.C. § 1252 (2005)).

228. With respect to withholding of removal, REAL ID § 101(c) (codified at 8 U.S.C. § 1231 (2005)) amends INA § 241(b)(3) establishing the same burden of proof and credibility standards used for asylum, as amended by REAL ID § 101(a)(3) (codified at INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2005)).

229. REAL ID § 101(a)(3). This provision of REAL ID made similar modifications to Withholding of Removal (INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2005)). *See* IMMIGRATION LEGISLATION AND ISSUES IN THE 109TH CONGRESS, CRS REPORT 33125 2 (Oct. 17, 2005), *available at* http://opencrs.cdt.org/rpts/RL33125_20051017.pdf. *Cf. supra* at 226 (discussing the burden of proof pre-REAL ID).

230. ANKER, *supra* note 39, at 280-85.

231. IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID, *supra* note 15, at 5-6 (discussing that a claim based on extortion involving an economic motive along with an enumerated ground would qualify, but if it only involved an economic motive would not).

232. 10 F.3d 28, 35 (1st Cir. 1993) (discussed in Cianciarulo, *supra* note 37, at 118-19).

on the heavy caseloads and lack of guidance to asylum officers who usually conduct initial screenings, there is reason to suspect that adjudicators may interpret the centrality language from REAL ID as requiring a greater showing of the nexus between an enumerated ground and the harm suffered.

An asylum seeker is not presumed credible. On appeal, however, the asylum seeker may have a rebuttable presumption of credibility.[233] Legal scholars have underscored that "[c]redibility is arguably the most crucial aspect of any asylum case."[234] In making credibility determinations, section 101(a)(3) affords immigration judges greater discretion in determining an asylum seeker's credibility based on the totality of circumstances, including demeanor, candor, consistency of oral and written statements, and inherent plausibility of testimony.[235] This provision of REAL ID strengthens an immigration judge's ability to make a negative credibility finding and represents a reversal of Ninth Circuit precedent "that an adjudicator must make explicit the reasons for an adverse credibility finding or the court will accept the applicant's testimony as credible."[236]

In addition, REAL ID affords immigration judges greater latitude in credibility determinations because inconsistencies, inaccuracies, or falsehoods not central to the asylum claim may nevertheless factor into making a credibility determination.[237] The Eleventh Circuit in *Jasem v. U.S. Atty. Gen.*[238] noted while the greater deference and leeway granted to immigration judges' credibility determination by REAL ID did not apply in that case, the Court had not yet issued a published opinion on the applicability or effective date of those provisions.[239]

Furthermore, section 101(a)(3) authorizes immigration judges to require corroborating evidence for otherwise credible testimony "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[240] Thus, this provision of REAL ID also challenges Ninth

233. REAL ID § 101(a)(3).
234. Cianciarulo, *supra* note 37, at 129.
235. *See* Jared Joyce-Schleimer, *The State of the Real Id Act of 2005*, 19 GEO. IMMIGR. L.J. 611, 611 (2005).
236. IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID, *supra* note 15, at 3 (citing Kataria v. INS, 232 F.3d 1107 (9th Cir. 2000) and Cordon-Garcia v. INS, 204 F.3d 985 (9th Cir. 2000)).
237. REAL ID § 101(a)(3).
238. 157 Fed. App. 153, 158-60 (11th Cir. 2005).
239. *Id.* at 160 n.7.
240. REAL ID § 101(a)(3). In addition to the impact of the provisions of REAL ID on evidentiary requirements, some in the immigration field have expressed concern with

Circuit precedent "that an applicant's credible testimony alone always sufficed to sustain the burden of proof of eligibility where it was unrefuted, direct, and specific."[241] However, asylum may be granted despite the absence of corroborating evidence where the immigration judge finds the asylum seeker's testimony credible, persuasive and refers to specific facts showing that he is a refugee.[242]

B. Judicial Review of Final Orders of Removal

REAL ID section 106 eliminates habeas and other non-direct judicial review of final orders of removal and recognizes that courts of appeals have jurisdiction to review constitutional issues and questions of law.[243] By eliminating habeas review of final orders of removal, REAL ID makes a "petition for review filed with the appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal[.]"[244] A petition for review is also the sole means for reviewing a relief claim under the Convention Against Torture.[245]

To avoid a repeat of *St. Cyr* where the Supreme Court interpreted Congressional intent of IIRIRA as preserving general habeas jurisdiction, REAL ID section 106 sets forth: "[f]or purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review[.]"[246]

Within EOIR, the executive agency overseeing immigration courts, there have been concerns over the greater deference given to immigration judges as the trier of facts from the streamlining measures implemented at the BIA and now, REAL ID section 106. Former BIA Chairman Schmidt stated several reasons for the BIA's effectiveness as trier of fact.

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the consequences of big law firms, who are able to hire investigators to search for evidence, increasingly taking pro bono asylum cases. Executive Director Butterfield of the American Immigration Lawyers Association worries that as a result of big firm pro bono cases, immigration judges may unfairly raise the standard for corroborating evidence beyond that required by statute. Elizabeth Amon, *The Sheltering Storm: Winning Asylum Has Never Been So Difficult. As More Firms Take On Cases, Can Their Zealous Advocacy Overcome the Obstacles?*, AM. LAW., Feb. 2006, at 66.

241. IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID, *supra* note 15, at 4 (citing Ladha v. I.N.S., 215 F.3d 889 (9th Cir. 2000)).

242. REAL ID § 101(a)(3).

243. IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID, *supra* note 15, at 18.

244. REAL ID § 106 (codified at INA § 242(a)(5) (2005)). Habeas reviews of removal orders pending at the district courts as of May 11, 2005, were transferred to the appropriate court of appeals. *Real ID Now the Law*, *supra* note 15, at 814.

245. REAL ID § 106 (codified at INA § 242(a)(4) (2005)).

246. *Id.*

> In many cases, the expertise, independence, and sound judgment of this Board is all that stands between an asylum applicant and return to a place where he or she will face persecution or death. It is quite possible that we review more asylum adjudications than any other tribunal in the world. Certainly, each Board Member adjudicates many more asylum cases, from a wider variety of nationalities, than any individual Immigration Judge. . . Therefore, it is not clear to me why our vantage point is necessarily less revealing than that of the Immigration Judge and why we want to give such great deference to the Immigration Judge[.][247]

Conferring greater weight to the immigration judge's findings of fact may appear rational because the immigration judge is able to observe the asylum seeker's demeanor in the courtroom. However, there are significant concerns of constraints on the immigration judge's role as sole trier of facts given the heavy caseload and pressures of rendering an oral decision.[248] Thus, the immigration judge's greater ability to make a negative credibility finding coupled with the insulation of that decision from judicial review may a violate due process.

Legal scholar Legomsky recently examined former Attorney General Ashcroft's reformation of the BIA and Congress' restrictions on judicial review as devastating to the decisional independence of immigration judges. Legomsky states that Ashcroft's reforms sent a clear message: "You rule against the government at your personal peril."[249] He argues that decisional independence is critical to safeguarding the rule of law in terms of procedural fairness and that Congress and the executive branch have assaulted decisional independence.[250] Efforts to consolidate appeals of immigration cases in the Federal Circuit illustrates that the attack on decisional, or more precisely judicial, independence is not limited to administrative judges.[251]

C. Expanded Terrorist-Related Bars to Asylum

REAL ID sections 103 and 105 created a great media stir because these provisions expanded the definitions of "terrorist activity" and "terrorist organization." Those sections also expanded the definition and the inadmissibility grounds based on having engaged in terrorist activities,

247. Schoenholtz, *supra* note 33, at 355 (citing Matter of A-S-, 21 I&N Dec. 1106, 1114 (BIA 1998) (Schmidt, dissenting).
248. *See supra* at 229-30.
249. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).
250. *Id.* at 398, 408.
251. *See supra* text accompanying note 12.

and apply retroactively.[252] Moreover, REAL ID eliminated the difference between deportability and inadmissibility on terror-related grounds.[253] Proponents and critics debated whether these provisions of REAL ID provide greater protection against terrorist attack.[254] Prior to REAL ID, an alien had to show by a preponderance of the evidence that he did not and should not have reasonably known that his solicitation or material support would further an organization's terrorist activities to qualify for the exception to the inadmissibility ground of engaging in terrorist activity ("security bar").[255]

REAL ID Section 103 increased the burden of proof to clear and convincing evidence to show that the actor did not and should not reasonably have known that his act affords material support.[256] In addition, Section 103 eliminated the requirement that the act be in furtherance of the organization's terrorist activity.[257] Prior to REAL ID, the security bar had been applied to notable cases, including Orlando Bosch Avila, former leader of anti-Castro Cuban resistance, and Omar Ahmed Ali, leader of a fundamentalist movement whose followers were involved in 1993 World Trade Center bombing.[258]

However, REAL ID's expansion of the inadmissibility grounds created a conflict with U.S. foreign policy and with U.S. refugee policy. Burmese refugees of various ethnicities scheduled to be resettled in the United States after having lived for many years in refugee camps in Thailand were barred from entering the United States because of REAL ID's material support bar to asylum in conjunction with provisions of the Patriot Act.[259] These refugees had provided minimal assistance to a

252. REAL ID §§ 103, 105 (codified respectively at 8 U.S.C. § 1182 (2005) and 8 U.S.C. § 1227 (2005)).

253. IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID, *supra* note 15, at 19.

254. Meissner, *supra* note 226; House Passes Real ID, *supra* note 1; Patricia J. Freshwater, Note, *The Obligation of Non-Refoulement under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens?*, 19 GEO. IMMIGR. L.J. 585, 593 (2005) (noting that "no member of Al-Qaeda who was involved in the attacks of 9/11 had been granted asylee status in the United States; all had entered the country through other legal immigration routes.").

255. IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF REAL ID, *supra* note 15, at 19 (engaging in terrorist activity was defined in former INA section 212(a)(3)(B)(iv)).

256. REAL ID § 103 (codified at INA § 212 (a)(3)(B)(i)(I), 8 U.S.C. § 1182 (a)(3)(B)(i)(I) (2005)).

257. *Id.*

258. ANKER, *supra* note 39, at 443.

259. Rachel L. Swarns, *Provision of Antiterror Law Delays Entry of Refugees*, N.Y. TIMES, Mar. 8, 2006, at A20; Press Release, State Department, Secretary Decides Material Support Bar Inapplicable to Ethnic Karen Refugees in Tham Hin Camp, Thailand (May 5, 2006) at http://www.state.gov/r/pa/prs/ps/2006/65911.htm (on file with

group in Burma that advocated the self-defense of ethnic Karen against Burmese government repression.[260] Eventually, after a great deal of pressure from organizations and individuals that had been working with Burmese refugees, Secretary of State Rice issued a waiver to REAL ID's material support bar for these refugees.

Around the time that organizations were pressing the Secretary of State to issue a waiver, the BIA rendered a decision in *Matter of S-K-*[261] involving an ethnic Chin Burmese respondent. The asylum seeker by having donated money for approximately 11 months to the Chin National Front ("CNF") whose goal is to secure freedom for ethnic Chin in Burma, was held by the immigration judge and affirmed by the BIA to have provided material support to a terrorist group. As such, she was statutorily barred from asylum and from withholding of removal. The BIA found there was no *mens rea* requirement in order for the material support bar to apply and "that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as "freedom fighters," and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic."[262] BIA Member Osuna cautioned in a concurring opinion:

> the statutory language is breathtaking in its scope. Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist organizations because their activities coincide with our foreign policy.[263]

These changes have significant implications for overturning the long-standing policy that an individual who committed a serious political crime may qualify for asylum.[264] A political crime is contrasted to a non-political crime in the Refugee Convention. Moreover, while the

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SDILJ); *BIA Denies Asylum to Burmese Christian Chin under Material Support Bar*, 83 No. 25 INTERPRETER RELEASES 1297, 1297-1300 (July 3, 2006).

260. *Id.*; Rachel L. Swarns, *U.S. Eases Curbs on Resettling Burmese Refugees*, N.Y. TIMES, May 5, 2006, at A18.

261. 23 I & N Dec. 936, 936 (BIA 2006) (decided June 8, 2006). Subsequently, DHS granted respondent deferral of removal under the Convention against Torture. *Terrorist Support Exception Extended to Chin Refugees from Burma,* 83 No. 41 INTERPRETER RELEASES 2255, 2256 (Oct. 23, 2006).

262. *Id.* at 941.

263. *Id.* at 948 (Osuna, concurring).

264. *See* Anker *supra* note 39, at 351-55 (discussing political offenses and the "long American tradition of granting protection to persons based on their activities in resistance to totalitarian regimes"). *Id.* at 352.

Refugee Convention precludes granting refugee status to those who have committed a serious non-political crime, it creates an exception for political offenses.[265]

> In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose, i.e., whether it has been committed out of genuine political motives and not merely for personal reasons or gain. . . .The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.[266]

The end of the Cold War along with the proliferation of international agreements and domestic legislation to prevent any act of terrorism suggests a growing hostility to asylum seekers who committed political crimes, even in totalitarian regimes, which will present an enormous barrier to qualifying for asylum.

The purpose of the security bar is to prevent those who support terrorism that threatens U.S. national security from obtaining a benefit under the INA. In evaluating whether an alien's activities constitute a danger to U.S. security, the Ninth Circuit in *Cheema v. Ashcroft*, a pre-REAL ID decision, stated,

> it is by no means self-evident that a person engaged in extra-territorial or resistance activities—even militant activities—is necessarily a threat to the security of the United States. One country's terrorist can often be another country's freedom-fighter.[267]

The court in *Cheema* articulated a two-part analysis: (1) did the alien engage in a terrorist activity, and (2) are there reasonable grounds to believe that the alien is a danger to the security of the United States.[268] Evaluating whether an alien is a danger to the security of the United States "requires evidence, not speculation."[269]

Following the enactment of REAL ID there is scant caselaw addressing the security bar, what constitutes material support, or what constitutes a danger to U.S. national security. The Third Circuit in *Singh-Kaur v.*

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265. *Id.*

266. HANDBOOK, *supra* note 161, at ¶ 152. *Cf.* Matter of O'Cealleagh, 23 I & N Dec. 976, 980-84 (BIA 2006) (INA § 212(a)(2)(A)(i)(I) requires that the offense must be completely or totally "political.").

267. 383 F.3d 848, 858 (9th Cir. 2004).

268. *Id.* at 859.

269. *Id.* The Ninth Circuit described the Contras in Nicaragua as using "terrorist tactics," but emphasized that, absent specific evidence, it would be "difficult to conclude . . . that supporters of the Contras within the United States compromised national defense." *Id.* at 858. The court also described Congress' action of passing the Comprehensive Anti-Apartheid Act in 1986 to pressure South Africa to free Nelson Mandela, whom the South African government had convicted of treason, from prison as a prime example of an act that did not endanger the security of the United States. *Id.* at 859.

Ashcroft held that providing food and setting up shelter qualifies as material support to establish inadmissibility based on engaging in terrorist activity.[270] In an unpublished decision, *Arias v. Gonzales*, Arias argued that he qualified for the exception to the inadmissibility ground because he did not reasonably know that his conduct provided material support. The Third Circuit held that there was substantial evidence to show that Arias made voluntary payments to the FARC, a designated terrorist organization, which amounted to the alien reasonably knowing he provided material support.[271]

However, in *Daneshvar v. Ashcroft*, the Sixth Circuit held in a pre-REAL ID decision that the BIA committed legal error by failing to consider an alien's state of mind at the time of soliciting membership for a terrorist organization to determine inadmissibility for engaging in terrorist activity.[272] The alien's state of mind is relevant to qualifying for the exception to the inadmissibility ground as he has to "'demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity.'"[273]

Third Circuit Court Judge Barry in discussing *McAllister v. Attorney General*, 444 F.3d 178 (2006), which involved a North Irish family who sought asylum in the United States but were barred because of the father's activities in 1981 in support of the Irish National Liberation Army, aptly addresses a problem with current legislation that prevents individual determinations by relying upon blanket terms.[274] "It simply should not be that, particularly in circumstances such as those we now have before us, the individual and his individuality are largely, if not entirely, irrelevant, lost in a sea of dispositive definitions and harsh and complex laws."[275]

270. 385 F.3d 293, 299 (3d Cir. 2004).
271. 143 Fed. App. 464, 468 (3d Cir. 2005); *but see supra* at 219 (discussing the U.S. Committee for Refugees' criticism of the utilization of cases of extortion to satisfy the inadmissibility ground based on material support for a terrorist organization).
272. 355 F.3d 615, 616 (6th Cir. 2004).
273. *Id.* at 628 (citing 8 U.S.C. § 1182(a)(3)(B)(iv)(V)(cc)).
274. 444 F.3d 178, 192 (3d Cir. 2006) (Barry, J. concurring).
275. *Id.* at 192.

V. LEGAL PROBLEMS WITH GREATER RESTRICTIONS ON ASYLUM-SEEKERS IMPOSED BY REAL ID

As noted by Congresswoman Lofgren, many groups commented on the negative impact that REAL ID would have on asylum seekers. The American Immigration Lawyers' Association highlighted that provisions of REAL ID would "prevent people fleeing from persecution from obtaining asylum[.]"[276] Human Rights Watch warned that REAL ID "undercuts U.S. commitments to vulnerable populations, and it does so disingenuously by dressing up its proposals in the language of terrorism[.]"[277] Amnesty International condemned the passage of REAL ID, especially as it applied to female asylum seekers.[278] "[I]mmigration judges or asylum officers would be authorized to deny asylum if they mistakenly distrusted an asylum applicant's demeanor, or because an applicant wasn't able to produce a particular piece of evidence."[279]

Human Rights First criticized REAL ID noting that those having suffered human rights abuses and persecution will be harmed.[280] With respect to religious persecution, the Hebrew Immigrant Aid Society criticized the measure making persecution on account of religion a central reason for persecution as it required "'prov[ing] with unrealistic precision what is going on in their persecutors' minds.'"[281] Similarly, UNHCR stated,

> [w]hile UNHCR fully supports states' efforts to prevent terrorists from abusing asylum programs, we believe the provisions of H.R. 418 that impact refugee protection do not achieve this goal and could prevent those truly at risk of persecution from finding safety in the U.S.[282]

An area of asylum law that critics of REAL ID believe will be harshly impacted is gender-related claims of persecution as the United States

276. Lofgren, *supra* note 46, at 376.

277. HUMAN RIGHTS WATCH, IMMIGRANTS' RIGHTS UNDER ATTACK IN HOUSE BILL (H.R. 10) (Oct. 6, 2004), *available at* http://hrw.org/english/docs/2004/10/06/usdom 9469_txt.htm (last visited Oct. 20, 2006) [hereinafter "IMMIGRANTS' RIGHTS UNDER ATTACK IN HOUSE BILL"].

278. AMNESTY INT'L, THE REAL ID ACT OF 2005 AND ITS NEGATIVE IMPACT ON ASYLUM SEEKERS (2005), *available at* http://www.amnestyusa.org/uspolicy/pdf/ ealid_ 0305.pdf (last visited Oct. 20, 2006).

279. *Id.*

280. Bob Egelko, *New Limit on Review of Asylum Cases Immigration Judges' Decisions Would Be Harder to Overturn*, S.F. CHRON., May 16, 2005, at A1.

281. *Id.*

282. Lofgren, *supra* note 46, at 376-77 (quoting Letter from UNHCR to Rep. Zoe Lofgren (Feb. 4, 2005)).

has inconsistently observed UNHCR guidelines on the protection of refugee women.[283]

Critics assailed REAL ID as violating international law, both customary international law and treaties. The heightened burden of proof requiring that persecution based on an enumerated ground be a central reason of the claim is not supported in the Handbook or Refugee Convention and leads critics to argue that an asylum seeker would have to demonstrate her persecutor's mental state.[284] This provision violates Article 27 of the American Declaration of the Rights and Duties of Man, which establishes an individual's right to "seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."[285] This provision also violates the spirit of the duty of non-refoulement. Increasing the burden of proof to qualify for asylum beyond the international standard set forth in the Refugee Convention may result in denials of numerous bona fide asylum claims. In addition, the modifications made by REAL ID to withholding of removal also indicate violations of non-refoulement, especially in light of the fact that withholding of removal is not a discretionary remedy.

Another highly controversial provision of REAL ID is the stripped judicial review of final orders of removal, which violates Article 13 of the International Covenant on Civil and Political Rights ("ICCPR").[286] This article provides that removal must be "in accordance with law," which includes the right to appeal a removal order with a limited exception for "compelling reasons of national security[.]"[287] Unless an asylum seeker is charged with a terrorist-related ground of inadmissibility or removability, she is entitled to a right to appeal the immigration judge's decision. Given the BIA's increased reliance on summary affirmances, it is not unreasonable to construe the right to appeal in conjunction with a due process requirement that the case receive meaningful review.

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283. Amy K. Arnett, *One Step forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights under the Safe Third Country Agreement*, 9 LEWIS & CLARK L. REV. 951, 954-55 (2005).

284. IMMIGRANTS' RIGHTS UNDER ATTACK IN HOUSE BILL, *supra* note 277.

285. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

286. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).

287. *Id.* at 372.

The heightened credibility and corroborating evidence requirements of REAL ID are also likely to violate international law. Legomsky has noted the assault on immigration judges' decisional independence and others comment on the great variance in the rate of granting asylum.[288] In addition, insulating credibility determinations from judicial review will lead to inconsistent results sometimes resulting in the arbitrary denial of asylum. Furthermore, the standards for assessing credibility may be unreasonable based on how the trier of facts interprets language and demeanor which vary greatly among asylum seekers who are in a "particularly vulnerable situation."[289] In addition, an asylum seeker may be found not credible based on inaccuracies or inconsistencies which are not central to the asylum claim.

REAL ID also violates the Convention Against Torture because despite asylum seekers' ability to establish that it is more likely than not that she will be tortured upon return to the country of flight, a conviction or suspicion of terrorism will bar relief. Furthermore, decisions to deny Convention Against Torture relief are insulated from judicial review thereby violating Article 13 of the ICCPR.

Critics have also assailed REAL ID for violating international law standards against the arbitrary arrest and detention of asylum seekers.[290] This criticism is somewhat misplaced because the arbitrary arrest and detention of asylum seekers was implemented by IIRIRA's expedited removal procedures. Nevertheless, studies such as the USCIRF's on the impact of expedited removal procedures on asylum seekers' claims clearly shows that some asylum seekers are unlawfully being denied safe haven in the United States.[291] Absent exigent circumstances, mandatory detention of a class of individuals without an individual determination violates due process.[292]

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288. *See supra* at 248; *supra* note 108.

289. *See* HANDBOOK, *supra* note 161.

290. IMMIGRANTS' RIGHTS UNDER ATTACK IN HOUSE BILL, *supra* note 277.

291. *See supra* at 243.

292. Demore v. Kim, 538 U.S. 510, 551-552 (2003) (Souter, J., dissenting) ("Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause by doing what [8 U.S.C.] § 1226(c) does, by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away."). *See also* Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 130 (2001) ("Both [the ICCPR and Refugee Convention] fail to define 'due process,' although the ICCPR provides us with minimum guarantees that must be applied in criminal cases. These include the right to prompt information concerning the nature and cause of the charge against a defendant in a language that she understands; adequate time and resources to prepare a defense and communicate with counsel whom she chooses; trial without undue delay; trial in her presence and a right to defend herself or to defense through legal assistance of her

Recent legislation aims to further restrict the asylum process and threatens asylum seekers' rights under international law. Congressman Sensenbrenner introduced the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,[293] which would prevent refugees and asylees with an aggravated felony conviction from entering the country or becoming permanent residents.[294] The bill was passed by the House of Representatives on December 16, 2005, and may have a devastating impact on asylum seekers. Immigration reform legislation such as the bill introduced by Sensenbrenner has provoked public outcry by pro-immigrant groups, as well as support by immigration restrictionists.

VI. RECOMMENDATIONS

Although restrictive asylum and immigration legislation is a response to increased national security concerns post 9/11, it is critical to evaluate whether such legislation actually makes the country safer. In addition, such legislation must be evaluated not only in terms of whether it imposes an unreasonable burden on noncitizens, but also whether it is contrary to U.S. and international principles of liberty and equality before the law. Referencing *Dred Scott v. Sandford*[295] for its lesson about sacrificing noncitizens' liberty to preserve citizens' liberty and theorist Alexander Bickel, legal scholar Cole highlights that "our experience with delimiting rights on the basis of citizenship should give us pause."[296] He also notes that "reliance on double standards reduces the legitimacy of our struggle, and that legitimacy may be our most valuable asset[.]"[297]

The judiciary tends to afford the executive branch great deference in matters concerning immigration and asylum law because of their impact on national sovereignty. However, the Supreme Court's rulings on

choosing and to free legal assistance if necessary; to examine witnesses against her and to obtain witnesses in her defense; free assistance of an interpreter; the right not to incriminate herself; and the right to judicial review.").

293. *See supra* note 17 and accompanying text.

294. Immigrant Legal Resource Center, Legislative Analysis of HR 4437 (posted Dec. 23, 2005), *available at* http://www.ilrc.org/HR4437.php (last visited Oct. 20, 2006).

295. 60 U.S. (19 How.) 393 (1857).

296. Cole, *supra* note 7, at 980. See *Korematsu v. United States*, 323 U.S. 214 (1944), for an example of delimiting rights on the basis of racial/ethnic background and the Supreme Court's deference to the executive branch during wartime. *See also* Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

297. Cole, *supra* note 7, at 1004.

questionable executive policies like the interdiction of refugees on makeshift rafts at sea and curtailed asylum review in *Sale*[298] suggest that the judiciary's deference to the executive branch and lack of rigorous scrutiny of asylum policy leave executive powers virtually unchecked. While deference to executive decisions is required in some areas of immigration and asylum law, in recent years some U.S. courts have abdicated their balancing role in the separation of powers and have not provided meaningful review of asylum cases.

Likewise, Congressional legislation restricting asylum law and procedures has steadily encroached upon one of the core principles of due process—providing a meaningful opportunity to be heard.[299] The Supreme Court in *St. Cyr* expressed concern that the legislature may use "retroactive legislation as a means of retribution against unpopular groups[.]"[300] Asylum seekers and immigrants are currently targets of restrictive legislation and it is important for the judiciary to carefully guard against laws denying asylum seekers basic human rights.

Given the enormous administrative and procedural difficulties with effectively operating an asylum policy that complies with domestic concerns and international law, appellate review must be improved. To avoid inconsistent and often arbitrary results in the adjudication of asylum claims, uniform evidentiary and credibility standards for adjudication of asylum claims must be established. A great frustration with asylum law is that even though it deals with federal law, the results are so varied depending upon the circuit court of appeals where the asylum seeker filed her application.[301] Additionally, given the heavy caseloads, lack of resources at Immigration Courts, and widely disparate outcomes depending upon whether or not an asylum seeker is represented by an attorney, it is important to provide sufficient funding to improve Immigration Courts. The number of appeals of immigration judges' decisions will continue to grow until there is an effective system that provides for the reliability of outcomes and legislation that

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298. *See* Fitzpatrick, *supra* note 30, at 25 (In construing the [Refugee] Protocol in Sale to fit the narrow constraints the Government preferred to impose on domestic law, the Supreme Court did international law a double disservice. First, the Court ignored the UNHCR's plea to avoid placing a falsely narrow interpretation on the treaty... Second, the court supplied the Executive Branch with a cynical defense to international criticism for breaching the Protocol, muting the effect of international condemnation of the interdiction policy.).
See also supra at 221-22.

299. For core principles of due process, see *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

300. *See supra* at 238-39.

301. See *supra* text accompanying notes 7-8.

restores some discretionary forms of relief to avoid the increasingly harsh outcomes for minor offenses.

Restoring administrative appellate review should improve the reliability of outcomes, but it does not address the attack on the decisional independence of immigration judges by the executive branch. To have an effective Immigration Court, it is critical that asylum seekers receive qualified legal representation to present their asylum claims. Moreover, immigration officials at ports-of-entry and asylum officers should be given better training and clear guidelines to follow when screening asylum seekers.

Several federal appellate judges have commented on the lack of procedural justice in immigration cases. Judge Posner of the Seventh Circuit Court of Appeals writes,

> In [2005], different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits.[302]

Posner identifies as the systemic problem that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[303]

Drawing on O'Connor's dissenting opinion in the *Medellin v. Dretke*[304] case on informing aliens of their legal rights, it is imperative that asylum seekers be informed of their rights. Enforcement activities to prevent unlawful entry at the border or airports where individuals are not informed of the right to seek asylum conflicts with obligations under international law to inform asylum seekers of their legal rights.

To improve the asylum process, legislators should consider the long-term consequences of whether proposed legislation will actually make the country safer while taking into account how domestic policies affect international perceptions of U.S. democracy and commitment to the rule of law. The executive branch should have independent agencies, like the USCIRF, conduct regular studies of asylum procedures to ensure that all involved are complying with domestic and international guidelines. Lastly, the judiciary should prudently consider legislation and executive action to ensure that

302. Benslimane v. Gonzalez, 430 F.3d 828, 829 (7th Cir. 2005) (discussed in *Seipp & Feal*, *supra* note 143).

303. *Benslimane*, 430 F.3d at 830 (noting that the problem of inadequate adjudication of immigration cases is "not of recent origin").

304. 544 U.S. 660, 125 S. Ct. 2088, 2104-05 (2005) (O'Connor, J., dissenting).

asylum seekers' basic human rights are not violated and that U.S. policies are not in contravention of international law.

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